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## PREFACE TO FOURTH EDITION

IN preparing a fourth edition of this book I have taken the opportunity of bringing the general subject matter up-to-date, by the inclusion of recent case law decisions and the incorporation of minor amendments necessitated by recent legislation.

Once again I would like to thank readers for the appreciations of this textbook which they have expressed.

O. G.

*June, 1937*



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## ABSTRACT OF CHAPTER I

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# A GENERAL INTRODUCTION TO COMPANY LAW

- § 1 —HISTORICAL SURVEY.
- § 2.—A COMPANY IS A SEPARATE ENTITY
- § 3 —CONSTITUTION OF THE COMPANY.
- § 4 —HOW THE COMPANY EXPRESSES ITS WILL.
- § 5 —CONTENTS OF THE MEMORANDUM.
- § 6 —FUNCTIONS OF THE ARTICLES.
- § 7.—NUMBER OF MEMBERS
- § 8.—INCORPORATION AND COMMENCEMENT OF BUSINESS.
- § 9 —THE PROSPECTUS
- § 10 —MINIMUM SUBSCRIPTION AND UNDERWRITING.
- § 11 —ALLOTMENT, SHARES AND SHARE WARRANTS.
- § 12 —DEBENTURES
- § 13.—STATUTORY MEETING AND STATUTORY REPORT.
- § 14.—DIRECTORS.
- § 15 —AUDITORS.
- § 16.—ANNUAL GENERAL MEETING AND DIVIDENDS.
- § 17.—EXTRAORDINARY MEETINGS
- § 18 —ANNUAL RETURN.
- § 19 —LIQUIDATION.
- § 20.—RECEIVERSHIP.
- § 21.—DISSOLUTION.



## CHAPTER I

# A GENERAL INTRODUCTION TO COMPANY LAW

*Certain generalisations are made in this Introduction, the points being dealt with more fully in the subsequent text.*

### § 1.—Historical Survey.

With the growth of trading in the Middle Ages, traders found a considerable advantage in combining with each other for the purpose of carrying on business in common, bringing together larger amounts of capital than they could individually command, and combining and sharing their common experience and the profits resulting from their trading. Such combinations were known as partnerships, and so far as concerns England and Wales, had no legal existence apart from the individual partners, the property and debts of the firm (as it was called) being considered to be the property and debts of each individual partner. In the nature of things, a partnership ceased to exist on the death of a partner and in certain other circumstances, and as trade continued to increase and larger aggregations of capital were required, a more permanent form of partnership was evolved, known as the Joint Stock Company. These Companies were treated in law as large partnerships, and whilst the capital holdings of the members were transferable, their liability for the debts of the Company was unlimited. In some cases these Companies were incorporated and given a legal existence apart from their members, the incorporation being by Royal Charter or Letters Patent from the Crown,\* or at a later date, where the Company was formed for the purpose of providing a public utility, by Special Act of Parliament.

In 1844 an Act was passed for the Registration of Joint Stock Companies, and a Company registered thereunder became incorporated and could hold property and sue and be sued

\* Letters Patent are writings of the Sovereign, sealed with the Great Seal of England, whereby a person or public company is enabled to do acts or enjoy privileges which he or it could not do or enjoy without such authority (*Wharton's Law Lexicon*).

in its own name; but the liability of its members remained unlimited. Other legislation affecting Companies was enacted from time to time, and in 1855, the privilege of limited liability, until then considered as being against public policy, was granted to Companies, whilst in 1862, the previous legislation was repealed and re-enacted in consolidated form in the Companies Act, 1862. New Acts followed from time to time as circumstances required, until in 1908 the thirteen or more Acts existing relating to Companies were repealed and re-enacted in the form of the Companies (Consolidation) Act, 1908. After 1908 there were three more Companies Acts, which were cited with the principal Act as "The Companies Acts, 1908 to 1917," and during 1925 a Committee sat to enquire into, and make recommendations as to the amendment of the Company Law to bring the legislation into line with post-war requirements and experience. As a result of their report, published in May, 1926, the Companies Act, 1928, was passed, incorporating the Committee's recommendations. It was never intended, however, that this statute as such should become operative, and the whole of the existing legislation, including the 1928 Act, but excluding one war measure of minor importance, have been consolidated into the Companies Act, 1929, which became effective on 1st November, 1929.

The existing provisions of the law on this subject have in many cases been enacted by the Legislature to guard persons giving credit to Companies, or providing capital for them, against the occurrence and recurrence of frauds and failures, so as to create and maintain confidence in the public mind as to Incorporated Companies. The general effect of registration is to make available to persons giving credit, reliable information as to the organisation and funds of the Companies in which they are interested, and to give to investors in addition, some protection against breach of trust on the part of directors, and others concerned in the promotion and management of Companies.

## **§ 2.—A Company is a Separate Entity.**

A Company formed and registered under the Companies Acts, is a CORPORATION, that is, an artificial person created by law and endowed with perpetual succession, and existing apart from its members. It is an entirely SEPARATE ENTITY

from the members, or corporators as they are termed legally, and is not affected by the death of any of them or the transfer of their interests. Any person or firm may transfer his or its business to a limited liability Company, and provided there is no fraud on the creditors or any other interested party in connection with the Company's formation, or the transfer of the business, no objection can be raised before the Courts in the matter. In some cases the whole, or nearly the whole of the capital of the Company (with the exception of the few shares held by others to make up the minimum membership) may be held by one person, the Company being then commonly spoken of as a ONE MAN COMPANY.

Under the Companies Acts, there are three classes of Companies, namely—(1) COMPANIES LIMITED BY SHARES (with which this book mostly deals and to which reference is always understood in the absence of any notice to the contrary); (2) Companies Limited by Guarantee; and (3) Unlimited Companies. Any of these may be either (*a*) a Public, or (*b*) (provided that there is a share capital), a Private Company, of which classification mention will be made later herein.

### § 3.—Constitution of the Company.

Every corporation must have a Constitution of some kind calling it into existence; in the case of a "Chartered" Company this is the Charter from the Crown; in other cases it may be Letters Patent from the Crown or a Special Act of Parliament; in the case of a Company registered under the Companies Act, it is a document known as the MEMORANDUM OF ASSOCIATION. The Memorandum is the foundation and constitution of the Company, and on it the very existence of the Company depends; it defines the objects for which the Company is formed and delimits its powers as between itself and the outside world. The regulations governing the internal management of the Company and the relations of its members with the Company and with each other, are set out in a second document, known as the ARTICLES OF ASSOCIATION.

In the first place the Memorandum of Association of a Company may be expressed to be unalterable, but, as will be seen later, it may be altered as to almost anything which it contains. The Articles of Association, on the other hand,

may be altered as much and as often as desired, by the members of the Company.

#### **§ 4.—How the Company Expresses its Will.**

A Company (as with other corporations) signifies its assent by means of its COMMON SEAL, which must be used in connection with most matters of importance connected with the Company; minor matters are dealt with by the directors and other officials within the powers conferred on them by the Company's Memorandum and Articles of Association. Members express their wishes relating to the business and affairs of the Company by means of RESOLUTIONS at MEETINGS. Resolutions (apart from certain very special cases) fall within three classes, namely (1) ORDINARY, (2) EXTRAORDINARY, and (3) SPECIAL. These vary in formality and importance, and the particular occasions when any one is to be used are prescribed in the Companies Act or in the Company's own Memorandum and Articles. The decision of the members on a resolution is obtained by VOTE, the rights of members as to voting being usually set out in the Company's Articles; where the vote is taken on a show of hands, each member is entitled to one vote, but a POLL may be demanded, in which case the number of votes of each member is usually governed by his holding in the Company's capital.

#### **§ 5.—Contents of the Memorandum.**

The Memorandum of Association of a Company limited by shares, sets out (1) the NAME of the Company, (2) its country of DOMICILE, (3) its OBJECTS, (4) the declaration that the LIABILITY of the members is LIMITED, and (5) the CAPITAL with which the Company is to be registered, and its division into shares of a fixed amount. There is a further clause termed the ASSOCIATION CLAUSE and the document is signed by the subscribers, whose signatures must be witnessed. Each subscriber must also show the number of shares which he takes.

The Name of the Company must not be identical with that of any other Company, nor so nearly resembling it as to be calculated to deceive; the last word of the name must be "LIMITED," as a warning to persons having or about to have business relations with the Company that the liability of its members is limited. The word may be dispensed with in

certain special instances,<sup>1</sup> under licence from the Board of Trade; but in ordinary cases the omission of the word may render the Company, and its officials, liable to penalties, and sometimes the official signing on behalf of the Company is personally liable for the debts incurred or acknowledged as a result of signing without the word "Limited." The name may be altered subject to the regulations of the Act.

Every Company must have a REGISTERED OFFICE, and in its Memorandum must state in which country the office is to be registered, thus fixing the Company's domicile. Within its domicile, the Company may change the situation of its registered office at will (each change being notified to the Registrar of Companies).

The Objects for which the Company is formed are usually set out very widely in the Memorandum, so as to state everything which the Company may possibly wish to do, since an alteration may only be made for certain reasons by Special Resolution of the members confirmed on petition by the Court. Any act done by the Company outside the scope of its Memorandum, is said to be *ultra vires*, i.e. beyond its powers, and is consequently of no effect, even if *all* the members give their approval of such act.

The Capital Clause in the Memorandum shows the amount of the capital with which the Company is formed and on which it must pay a Duty, at present at the rate of one-half per cent. The Company may issue capital up to but not exceeding the amount stated in the Memorandum, and it may increase its AUTHORISED (or NOMINAL) capital at any time (subject to its regulations and the fulfilment of necessary formalities), such increase becoming effective on the payment of the Duty on the increase. The capital may be altered in other ways (e.g. CONSOLIDATION, REDUCTION, etc.), and the rights of different classes of shareholders if expressed in the Memorandum may be varied, subject to the passing of the necessary resolutions, with, in some cases, the consent or approval of the Court. Capital may be divided into different classes, such as ORDINARY, PREFERENCE or DEFERRED capital, the rights of the holders being stated usually in the Memorandum, but sometimes in the Articles. The capital of the Company on registration must be divided into *shares*, which may be of any nominal amount, each share being indivisible and having a number,



but when the shares have been fully paid for by the holder they may be converted into STOCK, which is transferable in fragments of any minimum amount which the Company may decide.

Normally, during the continuing life of the Company, no part of its Capital may be returned to the members, apart from a REDUCTION of Capital, where such is in excess of the Company's requirements. There is one main exception to this, namely, that in particular circumstances a Company may issue REDEEMABLE PREFERENCE SHARES, and will then be able to repay the amount of such shares out of its accumulated profits, or the proceeds of a further issue of shares.

### § 6.—Functions of the Articles.

The ARTICLES OF ASSOCIATION, containing the INTERNAL REGULATIONS of the Company, deal with such various points as the rights of members, appointment of directors, meetings, resolutions, voting, etc. The Articles must be signed by the same persons as subscribe to the Memorandum, but the number of shares to be taken need not be stated. The Memorandum and Articles of Association between them constitute a Specialty Contract which is as binding on each and all the shareholders for the time being as if each had subscribed the documents originally. The Articles may be altered more freely than the Memorandum, a Special Resolution usually sufficing.

On registration of the Company, the Memorandum and Articles of Association must be filed with the Registrar of Companies, together with the consent of the directors to act in the case of a Public Company, whilst notification of the situation of the Registered Office must also be given and the stamp duties on capital paid. A Private Company must always file Articles, since by the definition contained in the Act a Private Company is one which *by its Articles* (1) restricts the right to transfer its shares, (2) limits the number of its members (exclusive of past and present employee-members) to 50, and (3) prohibits any invitation to the public to subscribe for its shares or debentures. A Public Company need not file Articles, but in that case a model set of Articles

attached to the Companies Act, and known as "TABLE A" applies in its entirety. Table A, unless specifically excluded, applies on all points on which, and to the extent to which, the registered Articles of the Company are silent. It is in consequence of this, that in addition to the specific clauses which must be included in a Private Company's Articles, such Articles must also exclude certain provisions of Table A which are repugnant to the restriction on the transfer of shares. Actually there are three sets of Articles known as Table A, viz. those of the Act of 1862, of the Act of 1908, and of the Act of 1929, respectively. Each one applies to the Companies registered prior to the commencement of the succeeding Table, unless a Company has adopted a later form by Special Resolution.

### § 7.—Number of Members.

The MINIMUM NUMBER OF MEMBERS in the case of a Public Company is SEVEN, and in the case of a Private Company TWO. The Private Company has the further advantage over the Public Company that it is exempt from certain formalities on formation and registration, and has not to file with the Registrar certain of the statements and documents required to be filed by Public Companies from time to time. A Private Company not complying with the special regulations, or which alters its Articles in such a way that they no longer contain the three provisions mentioned in the preceding paragraph, forfeits the privileges of a Private Company; it may be converted into a Public Company on the execution of certain formalities, whilst on the other hand a Public Company may, if desired, be converted into a Private Company. There is, in the case of a Public Company, no maximum to the number of its members, as with a Private Company, except to the extent that the number of members may be limited by the number of shares into which the Company's Capital is divided, but in either case, if the number of members falls below the prescribed minimum before mentioned, and the Company continues to do business for more than six months with less than such minimum, every member cognisant of the fact may be held liable for all the debts of the Company incurred after the said period of six months.

**§ 8.—Incorporation and Commencement of Business.**

When the Memorandum and Articles have been delivered and found in order and registered, the Registrar of Companies issues a signed certificate, known as the **CERTIFICATE OF INCORPORATION**, which is conclusive evidence that the Company named therein has been actually and duly registered in accordance with the regulations of the Companies Act. From the date mentioned in the certificate the subscribers to the Memorandum become a body corporate and can function as an Incorporated Company forthwith, but whilst a Private Company may commence business immediately, a Public Company must await the issue of a special Certificate entitling it to do so. The **CERTIFICATE ENTITLING THE COMPANY TO COMMENCE BUSINESS** is only issued by the Registrar when he has received from the Company a copy of its **PROSPECTUS** or **STATEMENT IN LIEU** thereof, and a Statutory Declaration made by the secretary or one of the directors, that the **MINIMUM SUBSCRIPTION** has been received by the Company, and that each of the directors has paid up on the shares for which he is liable in cash, the same proportion as has been paid by the public on the shares allotted to them. Where the Company does not invite the public to subscribe for its shares, the declaration in regard to the Minimum Subscription is not required, but the Directors must have paid the same proportion as is due on application and allotment on shares allotted to persons other than Directors.

**§ 9.—The Prospectus.**

In the case of a Public Company, it is assumed that some effort will be made to raise capital from the outside public, and the provisions mentioned in the preceding paragraph are intended to give protection to investors. If a Public Company requires to raise money it will usually issue a *PROSPECTUS* (a copy of which must be filed with the Registrar) which must be in strict compliance with the rather stringent requirements of the Act, specifying the numerous particulars required for the public information. If no Prospectus is issued, then most of the details which would have been required therein must be set out in a Statement in lieu of Prospectus to be filed with the Registrar. Directors and others must exercise every care to ensure that statements contained in

the Prospectus are correct, since any MISSTATEMENT may involve (i) renunciation of their applications by shareholders as against the *Company*, or (ii) action for damages as against the *directors*.

### § 10.—Minimum Subscription and Underwriting.

To guard against unscrupulous promoters or directors obtaining subscriptions and commencing business where the applications for shares have been inadequate for the purpose of carrying on the business (but, say sufficient to cover their own out-of-pockets), the Prospectus must state the MINIMUM AMOUNT which, in the opinion of the directors, must be raised by the issue of the shares to provide the funds necessary for the capital expenditure involved, the preliminary expenses of the Company and WORKING CAPITAL. If the minimum so stated is not, in the opinion of a possible investor, sufficient for these purposes, he will not apply for shares; but if the minimum is sufficiently high for the purpose, he will know that if applications to that amount are not received by the Company within forty days of the issue of the Prospectus, all application monies must be refunded within a further eight days, or the directors will be personally liable for the amounts plus interest at 5%. A company may guard against the failure of its appeal for subscriptions by entering into an agreement with certain persons who undertake to apply for the shares in proportion as the public subscriptions fall short of the total issued. Such persons are known as UNDERWRITERS, and the consideration payable to them for their undertaking is termed UNDERWRITING COMMISSION; such contracts are specifically recognised by the Act, but are subject to the Company's Articles as to authorisation, and the rate of commission payable, which rate may in no event exceed 10% of the price at which the shares are issued. Brokerage may be paid to stockbrokers and others in respect of introductions of applicants for shares.

### § 11.—Allotment, Shares and Share Warrants.

At least 5% on the nominal amount of each share must be paid on the application for such shares. A further sum is usually required to be paid on ALLOTMENT of the shares, whilst the balance is CALLED UP by the Company in instalments

as required, but strictly in accordance with its Articles and the terms of the Prospectus. CALLS must be paid by the shareholders when due and demanded, since otherwise, if the Articles so authorise, the directors may cause the shares on which calls are unpaid to be FORFEITED to the Company. On an original issue, or an issue within twelve months of becoming entitled to commence business, shares may be issued only at their nominal value (termed PAR) or at a premium, although the payment of underwriting commission is sometimes so arranged as to be almost indistinguishable from an issue at a discount. After twelve months from the before-mentioned date, the Company *may* issue shares of the same class as any previous issue of shares at a discount, but subject only to stringent conditions, including an application to, and the obtaining of the permission of, the Court. Shares are not necessarily issued against cash; they may equally be issued for a consideration other than cash, as where the assets of a business are transferred to a Company, but the contract in respect of such transfer must be filed with the Registrar and stamp duty paid in respect of the value of the assets.

An application for shares in a Company is usually in the form of an offer by the applicant, which requires acceptance by the Company to make the contract complete; such acceptance takes the form of ALLOTMENT, and the allotment is complete so soon as the letter of allotment has been posted, even if the letter is delayed, or never delivered, but until the allotment letter is posted the contract is incomplete and the applicant may withdraw his application. Within a month of an allotment of shares the Company must file a detailed RETURN OF ALLOTMENTS with the Registrar, and within two months must deliver to shareholders a CERTIFICATE setting forth particulars as to the member and his holding of the Company's shares. When the shares are fully paid, but not before, they may be converted into STOCK, whilst a Public Company's shares may be put into the form of SHARE WARRANTS, when the BEARER of the warrant is deemed to be the owner of the shares specified therein. Shares in a Company are freely transferable, but many Public Companies, and all Private Companies, take power to impose restrictions on transfer, in the first case more especially when the shares are only partly called or have calls in arrear.

When a Company is being floated it is sometimes considered advisable to divide the capital into shares of different classes. The most important special class is that of the PREFERENCE SHARE, which class is given some preferential or prior right over shares of another class usually known as ORDINARY SHARES. Such right may be as to a specified rate of dividend, or as to capital, or both. It is sometimes provided that the preferential dividend, if not paid in any one year, is to be carried forward and paid out of the profits of subsequent years, before any distribution is made on the Ordinary Shares, in which case the shares are known as CUMULATIVE Preference Shares; where such shares are also entitled to participate in the surplus profits remaining after a dividend at a specified rate has been paid on the Ordinary Shares, they are known as CUMULATIVE PARTICIPATING Preference Shares. Subject to any specific regulations of the Company to the contrary, Preference Shares are deemed always to be cumulative as to dividend, but have no priority rights as to capital over the Ordinary Shares.

### § 12.—Debentures.

Apart from the issue of shares, a Company may raise money by the issue of DEBENTURES. A DEBENTURE is an acknowledgment of indebtedness given by a Company, usually providing for payment of interest at a specified rate and for repayment of the capital sum advanced; security is usually given by the debentures for the payments mentioned, and such security may be in the form of a FIXED CHARGE or mortgage on specific assets of the Company or of a FLOATING CHARGE on the assets and undertaking of the Company, as existing from day to day. Money raised on the security of debentures is not capital within the meaning of the Acts, and debenture holders as such are not members of the Company. Debentures may be issued at par, at a premium or at a DISCOUNT, and in the last-mentioned case no special formality, or sanction of the Court, is necessary (cf. shares).

### § 13.—Statutory Meeting and Statutory Report.

Within a period of not less than one month nor more than three months of its being entitled to commence business, every *Public* Company must call a meeting of its shareholders,

known as the STATUTORY MEETING. This meeting is intended to give the members an opportunity of discussing the formation and prospects of the Company, and in order that details of such matters may be in their hands, the Company has to prepare and forward to them ~~seven~~<sup>seven</sup> days before the meeting a report known as the STATUTORY REPORT. This report contains details of the shares and debentures issued by the Company, and the cash received; of the preliminary expenses incurred in respect of the formation and registration of the Company and particulars of the balance of cash in hand. Particulars must also be set out in respect of contracts which have to be modified. A *Private* Company need not hold a Statutory Meeting nor prepare or forward a Statutory Report.

#### § 14.—Directors.

The administration of the business of the Company is usually vested in the DIRECTORS, who are appointed in the first place by the signatories to the Memorandum of Association, where not appointed in the Articles. The Articles usually contain provisions relating to their election, retirement, re-election, remuneration, powers, duties, share or other qualification, and so on. Directors are the agents of the Company, and stand in a fiduciary relationship to it; they may not, therefore, enter into contracts with the Company, unless the Articles expressly give permission. Directors may be held liable to the Company in respect of losses arising from gross negligence on their part, but not for losses arising from mere imprudence or lack of judgment. Under the Act they are required to keep true ACCOUNTS of all receipts and payments of money, of sales and purchases of goods, and of all assets and liabilities of the Company.

#### § 15.—Auditors.

In order that the shareholders may have some control over the acts of the directors, it is provided that every Company shall have an AUDITOR (or Auditors). The first Auditors may be appointed by the Directors prior to the First Annual Meeting, in which case their first duty will be to certify the Statutory Report in regard to certain of the contents. Thereafter they hold office from year to year, being re-appointed by the shareholders at the ANNUAL GENERAL MEETING. This

meeting must be held once in every calendar year, and not more than 15 months later than the preceding meeting. At such meeting the Directors must lay before the Company a Profit and Loss Account and Balance Sheet, together with their report with respect to the state of the Company's affairs, and their proposals as to dividends and transfers to reserves (if any). It is the duty of the Auditor to report on every Balance Sheet so laid before the Company in General Meeting during his tenure of office, in accordance with the provisions of the Acts and of the Company's Articles. The Balance Sheet must be signed by two of the directors (or the sole director) and the Auditor's report must be attached to the Balance Sheet. In order to prevent undue influence being brought to bear on the Auditor by unscrupulous directors, it is provided that no person other than the retiring Auditor shall be capable of being appointed Auditor at the Annual General Meeting unless certain notices have been given and formalities complied with, whilst the Auditors are entitled to be present at every meeting at which any accounts which they have audited are submitted to the Company and may make any statement or explanation they desire in regard to the accounts. The directors have power to fill a casual vacancy in the office of Auditor, but no director or other person holding any other office or employment for profit under the Company is capable of being appointed to the office. The Auditor's remuneration is fixed at the time of his appointment by the appointing parties.

### **§ 16.—Annual General Meeting and Dividends.**

At the Annual General Meeting the report of the Auditors on the accounts **MUST** be read (the accounts themselves usually being taken as read), dividends (if any) declared, directors and Auditors appointed or re-appointed, and any other general business dealt with. The **DIVIDENDS** are usually payable on the resolution of the shareholders, but the rate may not exceed the rate recommended by the directors. Where Table A applies, the dividends are payable on the paid-up value of the shares and not on the nominal value, whilst the directors have power to declare **INTERIM DIVIDENDS** without calling a meeting of the shareholders. Dividends may only be paid out of profit and not out of capital; depreciation of floating assets must be made good, but not necessarily that of fixed



assets before arriving at the DIVISIBLE PROFITS, and in all cases sufficient assets must be kept in hand with which to pay Creditors; the directors have power to put such sums to RESERVE as they think fit, even if by so doing dividends have to be restricted in amount or passed altogether.

### § 17.—Extraordinary Meetings.

Apart from the Statutory and Annual General Meetings there are also what are known as EXTRAORDINARY GENERAL MEETINGS, which are called on very special occasions for the purpose of putting Extraordinary or Special Resolutions before the members of the Company. Notices of all meetings must be sent to all the shareholders entitled to attend, to the addresses registered by them with the Company.

### § 18.—Annual Return.

In each year a Company must file with the Registrar its ANNUAL RETURN made up to the 14th day after the Annual General Meeting. This Return shows details of the share capital issued, etc., the names and so on of the present shareholders and of those persons who have ceased to be members since the last Return was made, and, in the case of a Public Company, a certified copy of the last audited Balance Sheet, accompanied by a copy of the Auditor's report. The file of any Company at Somerset House (where the Registrar of Companies in England and Wales carries out his duties) containing the annual and other returns and documents relating to the Company may be inspected by any person interested on payment of a search fee of one shilling.

### § 19.—Liquidation.

The Company may come to its end for various reasons, but that end must be either through LIQUIDATION or the less spectacular method of being STRUCK OFF THE REGISTER. LIQUIDATION is the legal process by which the affairs of a Company are wound up, and its property or the proceeds thereof distributed among the persons entitled thereto. A Company is said to be STRUCK OFF the Register when the Registrar, having reasonable cause to think that a Company has ceased to operate (as when he has received no return for

a number of years) removes the name of the Company from the Register, after due formalities and notices.

The decision to liquidate the Company is usually made by the shareholders themselves, but the liquidation may be by order of the Court. The Company may have been formed only for a stated period of time and the period have elapsed; or for the attainment of a particular object or the carrying out of a particular purpose, such object or purpose having been achieved; or it may have been unsuccessful in trading, with a consequent inability to meet its liabilities. Whether for one of these, or for any other particular reason, the liquidation will be by one of three methods, namely (i) VOLUNTARILY, with very little supervision from the Court or the Board of Trade; or (ii) VOLUNTARILY UNDER SUPERVISION of the Court; or (iii) COMPULSORILY, by order of the Court, when it is under the direct supervision of the Court and of the Board of Trade. The Voluntary Liquidation may be either a *Members' Voluntary Liquidation*, or a *Creditors' Voluntary Liquidation*; it will be the former where the Directors are able, after an enquiry into the Company's position, to make and file with the Registrar a Statutory Declaration that the Company will be able to pay its debts in full within twelve months of the resolution to wind up. In such case the Liquidation is in the hands of the members, but if the Statutory Declaration cannot be made, the Liquidation will be controlled by the Creditors. A LIQUIDATOR is appointed to wind up the Company's affairs and distribute the proceeds of its assets; in some cases he will be assisted by a COMMITTEE OF INSPECTION, the members of which are drawn from the respective bodies of Creditors and Shareholders.

If the shares of the Company are all fully paid, the shareholders cannot be called upon to make any further contribution to the Company's funds, no matter what its degree of insolvency may be. But if the shares are only partly paid, the shareholders, who are then termed CONTRIBUTORIES, are listed and may be called upon to pay up further sums, not in any case exceeding the amount remaining unpaid on their shares, for the purpose of paying off the Company's liabilities, or, for the purpose of adjusting the rights of shareholders or classes of shareholders among themselves. Where a person has ceased to be the holder of shares within a year of the

commencement of the winding up of the Company he may still be liable on the disposed-of shares, but only (i) if they are not fully paid, (ii) the transferee fails to pay the calls made on him, and (iii) to meet the unsatisfied claims of creditors whose debts, existing whilst the late member was still on the register, had not been cleared off before the date of the liquidation.

### § 20.—Receivership.

The liquidation *may* be preceded by, or be coincident with a RECEIVERSHIP where the Company had incurred liabilities on Debentures. On default in carrying out the terms of the Debenture the Debenture holders usually have the right to appoint a RECEIVER, who may also be a MANAGER, where the business has to be carried on for a time. The Receiver will usually realise the assets, and having paid his expenses and certain creditors having priority under Statute, will repay the debentures, and then pay any remaining balance to the Company, which will by then probably have gone into liquidation.

There may also be a Receivership not immediately followed by liquidation, and in many cases, a successful Receiver and Manager, appointed to a Company in an unsound financial position, has been able to “pull the Company round” and restart it on the path to prosperity.

### § 21.—Dissolution.

Where there is no receivership the liquidator will pay the expenses and the creditors in the order required by Statute; and if any balance remains over it will be distributed among the shareholders in accordance with their rights under the Memorandum and Articles. When the funds have been finally disposed of the liquidator will call the Final Meeting, file his Final Return with the Registrar, and in due course the Company's existence as a body corporate will cease, and its name will be removed from the Register.

## ABSTRACT OF CHAPTER II

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### THE NATURE OF A COMPANY

- § 1.—OF CORPORATIONS IN GENERAL.
- § 2.—IMPORTANCE OF CORPORATION'S SEPARATE PERSONALITY.
- § 3.—WHEN COMPANIES MUST BE FORMED.
- § 4.—THE COMPANIES ACTS.
- § 5.—LIMITED AND UNLIMITED COMPANIES.



## CHAPTER II

# THE NATURE OF A COMPANY

### § 1.—Of Corporations in General.

A corporation may be defined as:—

An artificial person, recognised in law, established for the purpose of preserving in perpetual succession rights which would fail if vested in a natural person.

From this definition, it will be apparent that the law recognises two distinct types of persons: (i) the natural person, and (ii) the artificial person. There are, of necessity, many differences between the two species, but on the other hand there are numerous important similarities. Thus, whether persons are natural or artificial, they can enjoy rights, own property, employ servants, buy and sell goods, and sue and be sued in the Courts; but, as simple examples of the points of difference, an artificial person cannot be made bankrupt and cannot die (using these words in their strict sense).

Corporations are of two kinds: (a) corporations sole and (b) corporations aggregate. Each species is an artificial person, but whereas the benefits accruing to or through a corporation sole are enjoyed by one natural person, the benefits accruing to a corporation aggregate are enjoyed by two or more natural persons. Thus, the Bishop of London is a corporation sole whose benefits are enjoyed by the prelate who fills the office for the time being, while the Prudential Assurance Company Limited is a corporation aggregate whose benefits are enjoyed by the numerous men and women who hold the company's shares.

In this volume, one particular class of corporation aggregate is dealt with, i.e. the company incorporated by registration, but it may be as well to remember that there are other classes. Thus, corporations are occasionally created by Royal Charter, e.g. The Bank of England, and there are a large number of companies which have been brought into being by a special Act of Parliament, e.g. railway companies. These corporations are not, however, subject to the provisions of the Companies Act, 1929, with which this book is primarily concerned.

## § 2.—Importance of Corporation's Separate Personality.

A company exists in law as a legal *persona*, separate and distinct from those people who are the members of the company; and whilst the company, as a person, may enter into transactions whereby it creates rights for itself and subjects itself to liabilities, the resulting benefits of its activities are ultimately enjoyed by the members, e.g. in the form of dividends upon their shares.

Since a company exists as a person merely in legal fiction, it may only engage itself in its activities by means of its directors and employees, and the rights and liabilities on such activities are those of the company; these agents or servants and also the members are not parties thereto, neither may they sue or be sued thereon. This vital principle is admirably illustrated by the well-known case of—

**Salomon v. Salomon & Co. Ltd.** [1897] A.C. 22. S, a boot manufacturer, sold his business to a limited company formed to take it over. As part of the consideration he received £10,000 in *debentures*. S, his wife, daughter and four sons each subscribed for a £1 share (seven shareholders were essential in law). Being unsuccessful, the company was wound up, its assets then being worth some £6,000 only. S claimed priority as a secured creditor in respect of his debentures. The unsecured creditors objected that S and his company were one, and claimed that their (the creditors') debts should first be discharged. It was HELD that S and the company were distinct persons, and that, although S was a member of the company, he was also a creditor. Consequently, as S held securities and the others did not, S was entitled to the assets in priority to the unsecured creditors.

## § 3.—When Companies must be Formed.

As a general rule, persons are at liberty to carry on trade or business in whatever manner they think fit, either alone or in partnership with others, or through the medium of a corporate person of which they are the members; but to this general rule there is an important qualification, for no company, association or partnership consisting of more than 20 members can be formed to carry on any business that has for its object the acquisition of gain unless it is:—

- (a) registered as a company under the Companies Act, 1929; or
- (b) formed in pursuance of some other Act of Parliament or of Letters Patent; or

- (c) a company engaged in working mines within the Stannaries and subject to the jurisdiction of the courts exercising the stannaries jurisdiction (S. 357).

In the case of an association or partnership formed for the purpose of carrying on the business of banking, however, such an association cannot have more than 10 members unless it is registered as a company under the Companies Act, 1929, or formed under some other Act of Parliament or Letters Patent (S. 358).

An association which does not comply with the provisions of Ss. 357 and 358 is an illegal association and, as such, has no existence or recognition in law. All contracts made by it in the conduct of its business are illegal, and as a consequence no rights or liabilities can arise in relation to its business activities. On such transactions it may not sue nor be sued.

There can exist therefore no contractual relation between the illegal association and third parties, neither is there any legal relationship between the association and its members, since the law cannot give legal recognition to membership of an association which is illegal. Such an illegal association cannot therefore bring an action to recover a debt incurred for money lent, either to members or to third parties.

**Wilkinson v. Levison** [1926] 42 T.L.R. 97. A large number of persons pooled their savings to form a fund for granting loans at interest. Each year the association recalled all its advances and distributed the fund among the members *pro rata*. L, who had borrowed money from the fund, refused to repay the sum, and action was brought by W, the secretary. It was HELD that as the association had for its object the acquisition of gain and was not registered as a company, it was illegal and could not, therefore, recover the moneys lent to L.

This absence of legal status does not permit officials of the association and others fraudulently to dispose of or convert its funds, and if they do so they may be convicted of embezzlement, since the officials have in law a fiduciary relationship to the monies and property in their custody and control.

Furthermore, as decided in the case of *Greenberg v. Cooperstein* [1926] 1 Ch. 637, members of an illegal association may bring an action of account against the officials for a return of subscriptions paid to the association. The learned judge in that case stated he did not himself "believe that the law is so powerless that when money is in the hands of persons who have



received it for application for an illegal purpose, it cannot protect the contributories or enable them to recover it before it has been applied for this illegal purpose."

Finally, since the association as such has no legal existence, the officials who purport to conduct its activities on its behalf, as its agents and officers, may find themselves personally liable to discharge obligations to innocent third parties who in ignorance of the illegality of the association have dealt with it *bona fide*.

#### § 4.—The Companies Acts.

In the historical survey contained in Chap. I, § 1, it was seen that the expansion of joint stock trading necessitated a number of Statutes and consolidating Acts from time to time, the last of such Acts being passed in 1929.

Companies registered after the commencement of the 1929 Act are, of course, governed wholly by its provisions; and by Ss. 316 to 318, the Act is extended also to companies registered under earlier Acts, but not to companies registered in the Irish Free State or Northern Ireland (S. 320).

As from the date of the commencement of the Act, therefore, all registered companies are subject to the regulations laid down by the Act, save in respect of a very few sections in which it is otherwise provided.

#### § 5.—Limited and Unlimited Companies.

A company being a legal *persona* and thus capable of acquiring property and incurring liabilities, it follows that whilst most companies are successful a number of them must encounter difficulties or meet with failure.

In the case of an ordinary individual, the whole of his assets will become available to his creditors in the event of his bankruptcy. The assets of a company are, similarly, available. The members of a company, however, are not *directly* liable to the company's creditors: the company's debts are not their personal debts, although by becoming members they enter into a contract with the company to contribute money if necessary towards the assets of the company, which assets become in turn available for the discharge of the company's debts.

Where *no* limit is imposed upon the amount which a member may be required to contribute, the liability of the members is unlimited, but “unlimited companies” are comparatively rare.

In the case of *all* “limited companies” there is a special clause in the Memorandum of Association (which document must be filed in connexion with the registration of every company, whether limited or unlimited) which declares concisely that:—

*4. The liability of the members is limited.*

Limited liability companies are of two kinds, namely those in which the liability to contribute is limited by:—

- (1) shares, e.g. of the nominal value of £1 each; or
- (2) guarantee, e.g. not exceeding £20 per member.

As to the liability in respect of shares, if a member has ten shares of £1 each in a company limited by shares, and has already paid the company 4s. 0d. in respect of each such share, his ultimate maximum liability in respect of calls, whether made in the ordinary way or during the winding up of the company, is limited to 16s. 0d. each, i.e. a further £8.

Since most readers are familiar with the first type of company, but have little or no contact with companies “limited by guarantee,” the standard clause as to contributions of members appearing in the Memorandum of Association of such a company may here be noted:—

*5. Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company, contracted before he ceases to be a member, and the costs, charges and expenses of winding up the same and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding . . . pounds.*

A company limited by guarantee may also have a *share* capital, if so declared in its Memorandum.



## ABSTRACT OF CHAPTER III

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### THE PROMOTION

- § 1.—STATUS AND LIABILITY OF PROMOTERS.
- § 2.—PRELIMINARY CONTRACTS.
- § 3.—PRELIMINARY EXPENSES.
- § 4.—PROCEDURE ON REGISTRATION.
- § 5.—EFFECT OF CERTIFICATE OF INCORPORATION.
- § 6.—COMMENCEMENT OF BUSINESS.



## CHAPTER III

# THE PROMOTION

### § 1.—The Status and Liability of Promoters.

In bringing about the formation of a company, a number of administrative acts have to be performed, and the persons who undertake these acts are the promoters of the company. It is impossible and undesirable to give a precise definition of the term "promoter" for, if there were such a definition, persons might take steps to keep without its scope in order to avoid the somewhat onerous liabilities which are incurred by promoters. Indeed, the persons who play a part in the formation of a company frequently attempt to avoid this liability by stipulating that they shall not be promoters, but all such attempts have failed, for any person will be a promoter, notwithstanding his repudiation of the term, if he "undertakes to form a company with reference to a given project and to set it going and . . . takes the necessary steps to accomplish that purpose" (per Cockburn, C.J. in *Twycross v. Grant* [1877] 2 C.P.D. 469).

Thus, the proprietor of a business who forms a company to purchase and run his business, is a promoter, as is the financier who forms a company to purchase a patent from an inventor; but where the person who performs the administrative acts which necessarily precede a company's formation does so not on his own account but as the agent or servant of another, the principal and not the agent is the promoter. Thus, if A, who wishes to form a company, employs B, a solicitor, to perform the necessary administrative acts for him, A, and not B, is the company's promoter.

The legal status of a promoter is incapable of precise statement, but Lindley, L.J., in *Lydney and Wigpool Co. v. Bird* [1886] 33 Ch.D. 95, stated of a promoter "although not an agent of the company nor a trustee for it before its formation, the old familiar principles of the law of agency and of trusteeship have been extended, and very properly extended, to meet such cases."

Furthermore, it is well established that the promoter must act in good faith towards the company he promotes; thus, it was held in *Erlanger v. New Sombrero Phosphate Co.* [1879] 39 L.T. 269, that "in equity the promoters of a company stand in fiduciary relation to it, and to those persons whom they induce to become shareholders in it, and cannot in equity bind the company by any contract with themselves as promoters without fully and fairly disclosing to the company all material facts which the company ought to know." As a result of this principle, it follows that:—

- (a) A promoter must not, without the knowledge and consent of the company which he promotes, profit at its expense; and
- (b) He can be made to account to the company for any profit made by him without its knowledge and consent (*Gluckstein v. Barnes* [1900] 82 L.T. 393).

The promoter must, therefore, make known to the company the extent of the profit which he is making out of the promotion, and must account for anything in excess of the sum disclosed, as if he were a trustee. If this is not done, the company may set aside any contract to purchase the promoter's property, or recover damages if rescission has become impossible (*Leeds & Hanley Theatre of Varieties* [1902] 2 Ch. 809).

**Jubilee Cotton Mills v. Lewis** [1924] 131 L.T. 579. L was induced by fraud to become one of the promoters of a company formed to purchase a cotton mill as a going concern. In consideration of his services, 95,000 £1 shares were allotted to L, but for technical reasons the allotment was void. Before discovering this, L sold the shares at a profit. For this profit L was held accountable, notwithstanding that he himself had been defrauded by his fellow promoters.

A promoter of a company, whose duty it is to disclose what profits he has made, does not perform that duty by making a statement not disclosing the facts, but containing something which, if followed up by further investigation, will enable the inquirer to ascertain that profits have been made and their amount. The disclosure must be a real disclosure to the persons interested and not a mere sham. Therefore a so-called disclosure by promoters to themselves in the capacity of directors of the company, or to nominees of their own, or to other persons interested with them in the transaction, is in reality no disclosure to the company, although such persons

may at the time be the only existing shareholders. "Disclosure is not the most appropriate word to use when a person who plays many parts announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company when as yet there were no shareholders, is a mere farce."

The proper method of disclosure is by means of the prospectus, as this satisfies the obligation not only to existing but also to future shareholders. If, however, when a company is formed, there is no intention of admitting any other shareholders, full disclosure of all material facts to the existing shareholders will be sufficient.

Although a promoter *as such* is not a trustee for the company which he promotes, circumstances may give rise to a trust, e.g. where he acquires property on the company's behalf after commencing the flotation; but the existence of such a trust is a question of fact which depends on all the circumstances (*Omnium Electric Palaces v. Baines* [1914] 1 Ch. 332).

## § 2.—Preliminary Contracts.

Where, as is usually the case, a company is formed in order to purchase an existing business or a patent, it is customary for the promoter to enter into a contract with the vendor of the business or patent. This contract, which is made before the company is formed, expresses the terms of the sale, and is necessary to ensure that the promotion shall not prove abortive, for if it were not made, the vendor might, after the company had been formed, either decline to sell or demand an outrageous price for the business, patent, etc. But these preliminary contracts give rise to many problems, for, as a promoter is not the agent of the company which he promotes, he cannot contract in its name before its formation (*Natal Land Co. v. Pauline Colliery Syndicate Ltd.* [1904] A.C. 120).

For this reason, preliminary contracts are invariably made in the name of the promoter, i.e., they are contracts between the vendor and the promoter, and not between the vendor and the company. But this practice renders the promoter personally liable to the vendor for the purchase price, and as the company is not obliged to adopt the contract, the promoter's position may be exceedingly unpleasant. This difficulty is overcome, however, by inserting in the contract clauses



providing that the contract shall be voidable by either party if for any reason the company is not formed, or if, after formation, it does not adopt the contract within an agreed period, and that if and when the company does adopt the contract, the promoter shall be discharged.

It is important to observe, however, that THE COMPANY IS NOT A PARTY TO THE PRELIMINARY CONTRACT and cannot, therefore, sue or be sued in respect thereof (*re English and Colonial Produce Co.* [1906] 2 Ch. 435). It is consequently necessary for the company, after its incorporation, to make a distinct new contract with the vendor, in order to obtain the benefit of the contract made by the promoter. This new contract is usually made formally, the company entering into a new agreement, embodying the terms of the preliminary agreement, but occasionally it may be implied from the conduct of the parties.

**Howard v. Patent Ivory Co.** [1888] 38 Ch. 156. The promoter of this company agreed to buy certain leasehold properties on the company's behalf. After incorporation, the Directors resolved to adopt the preliminary contract and issued debentures to the vendor, who, in return, assigned the properties to the company. It was HELD that, taking all the circumstances into consideration, a new contract between the company and the vendor must be implied.

There is, however, a rule of common law that where a person purports to contract as the agent of a non-existent principal, the contract cannot be made binding by the ratification of the principal after he comes into existence (*Kelner v. Baxter* [1867] L.R.2. C.P. 174). For this reason, a resolution of the board of a newly formed company adopting the preliminary contract will not of itself render the contract binding on the company (*Northumberland Avenue Hotel Co.* [1886] 33 Ch.D. 16). In other words, there must be something more than a mere ratification of the preliminary contract, viz. a new contract made expressly, or implied from the conduct of the parties.

### § 3.—Preliminary Expenses.

The formation of a company inevitably entails a number of preliminary expenses, i.e. disbursements which must be made, and obligations which must be incurred, before the company's incorporation. The liability for these expenses rests primarily upon the promoters by whom they are incurred, and it is,

therefore, necessary to consider how the promoters can obtain reimbursement for sums paid out by them, and an indemnity against further liability.

In many cases, the Articles provide that the company shall pay the preliminary expenses, or a sum to the promoters for their services, but this does not entitle the promoters to sue for the amount due to them (see Ch. IV, § 12), and it has been decided that the promoter cannot recover the preliminary expenses from the company unless it has expressly contracted to pay them (*English and Colonial Produce Co. supra*). But, in connection with such contracts, a difficulty arises, for services rendered *before* the making of a contract do not constitute valuable consideration therefor, and without valuable consideration a contract is not legally enforceable. A contract whereby a company agrees to pay for services already rendered must, therefore, be constructed in such a manner that some new consideration, e.g. future services, is imported. Thus, if in return for services rendered, shares are allotted to a promoter as fully paid, the allottee may be called upon to pay the nominal value thereof, unless there is some present consideration for the allotment (*re Eddystone Marine Insurance Co.* [1893] 3 Ch. 9).

Power to pay the preliminary expenses is usually given by the Memorandum of Association, but implied power exists even in the absence of such a provision (*Metropolitan Coal Consumers' Association v. Scrimgeour* [1895] 2 Q.B. 604).

#### § 4.—Procedure on Registration.

The formation of a company is effected by the registration of certain documents and the payment of certain fees. The documents which must be Registered are as follows:—

(1) A MEMORANDUM of Association (S. 1 (1)).

(2) ARTICLES of Association (S. 6).

But a public company limited by shares may, instead of registering special Articles, adopt Table A [see Chapter IV] in its entirety (S. 8).

(3) A LIST OF the persons who have consented to be DIRECTORS of the company (S. 140 (3)).

But this is not necessary in the case of a private company or a company with no share capital.

- (4) A STATEMENT OF the company's NOMINAL CAPITAL, showing how it is divided into shares.
- (5) A STATUTORY DECLARATION by a solicitor engaged in the formation of the company, or by a person named in the Articles as a director or secretary of the company, to the effect that the statutory requirements have been complied with (S. 15 (2)).

Further, in addition to the above documents, and in order to comply with the provisions of S. 140 (*infra*, Ch. X, § 2), there may have to be filed by the directors their written consent to act; and a written undertaking or a statutory declaration as to their share qualification (if any) is prescribed.

### § 5.—Effect of Certificate of Incorporation.

When the necessary documents have been registered and the appropriate fees paid, the Registrar issues a certificate of incorporation (S. 13 (1)).

The effect of this certificate is twofold:—

- (i) The members of the company, as from the date of the certificate, become a body corporate with perpetual succession and a common seal (S. 13 (2)).
- (ii) The certificate is conclusive evidence that:—
  - (a) the statutory requirements in respect of registration and of matters precedent and incidental thereto have been complied with; and
  - (b) the association is a company authorised to be registered and duly registered under the Act (S. 15 (1)).

In other words, the company is brought into being by incorporation, and the Registrar's certificate is conclusive evidence that incorporation has taken place.

**Peel's Case** [1867] 2 Ch. 674. After the subscribers to the Memorandum of Association [see Chapter IV] had signed, but before registration, the Memorandum was fundamentally altered by the promoters. The document, as altered, was registered, and a certificate of incorporation was issued. It was HELD that the certificate was conclusive evidence of the company's incorporation, notwithstanding the defect in the Memorandum.

But although the certificate supplies conclusive evidence of the company's existence, it is not to be taken as evidence that the company is not a trade union and therefore incapable of being registered (*British Association of Glass Bottle Manufacturers v. Nettlefold* [1911] 27 T.L.R. 527).

### § 6.—Commencement of Business.

As the company is non-existent prior to the issue of the certificate of incorporation, it cannot transact business or earn profits before that date. A *private* company may commence business as soon as the certificate of incorporation is issued, but a *public* company having a share capital and issuing a prospectus cannot commence business or exercise borrowing powers unless:—

- (a) shares to be paid for in cash have been allotted to an amount not less than the minimum subscription [see Ch. VI, § 13]; and
- (b) every director has paid to the company for his shares a proportion of the amount due in cash, equal to the proportion payable on application and allotment on the shares offered for public subscription; and
- (c) there is filed with the registrar a STATUTORY DECLARATION by the secretary or a director that the foregoing conditions have been complied with (S. 94 (1)).

Upon the filing of this statutory declaration, the Registrar issues a certificate entitling the company to commence business (S. 94 (3)).

Any contract made by a company after incorporation, but before it is entitled to commence business, is *provisional only*, but as soon as the company becomes entitled to commence business, any such contract becomes binding (S. 94 (4)). It is expressly provided, however, that between the date of the incorporation and the date on which the company becomes entitled to commence business, the company may:—

- (a) offer for subscription or allotment any shares or debentures; and
- (b) receive moneys payable on application for debentures (S. 94 (5)).

In the case of a company which does not issue a prospectus, a certificate of leave to commence business cannot be obtained until:—

- (a) A STATEMENT IN LIEU OF PROSPECTUS has been filed for registration, together with
- (b) A STATUTORY DECLARATION to the effect that every director has paid to the company for his shares a proportion of the amount due in cash, equal to the proportion payable on application and allotment on the shares payable in cash (S. 94 (2)).

Finally, by S. 92 (1), a company must have a Registered Office on the day that it commences business.

## ABSTRACT OF CHAPTER IV

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# THE MEMORANDUM AND ARTICLES OF ASSOCIATION

- § 1.—CONTENTS OF MEMORANDUM.
- § 2.—NAME OF THE COMPANY
- § 3.—ALTERATION OF NAME.
- § 4.—THE REGISTERED OFFICE.
- § 5.—THE OBJECTS CLAUSE.
- § 6.—WHAT COMPANIES MAY HOLD LAND.
- § 7.—HOW THE OBJECTS MAY BE ALTERED.
- § 8.—LIMITATION OF LIABILITY.
- § 9.—CAPITAL CLAUSE.
- § 10.—NATURE OF THE ARTICLES.
- § 11 —FORM AND CONTENTS OF ARTICLES.
- § 12.—EFFECT OF MEMORANDUM AND ARTICLES.
- § 13.—ALTERATION OF ARTICLES.
- § 14.—WHO IS ENTITLED TO COPIES OF MEMORANDUM AND ARTICLES.



## CHAPTER IV

# THE MEMORANDUM AND ARTICLES OF ASSOCIATION

### § 1.—Contents of Memorandum.

The Memorandum of Association is a registered document which defines the company's status, name and powers. In the case of a company limited by shares, the Memorandum must state:—

- (a) the NAME of the company, with "Limited" as the last word;
- (b) the part of the United Kingdom in which the REGISTERED OFFICE is to be situated;
- (c) the OBJECTS of the company;
- (d) that the LIABILITY of the members is LIMITED;
- (e) the amount of the SHARE CAPITAL and the division thereof into shares of a fixed amount (S. 2).

In addition, the Memorandum must contain a "Declaration of Association," which must be signed by at least seven subscribers (two in the case of a private company), each of whom must subscribe for at least one of the company's shares (S. 2 (4)). The Memorandum must be stamped as a deed, and be signed by the subscribers in the presence of a witness, who must attest the signatures (S. 3).

The Memorandum of an unlimited company differs from that of a company limited by shares in that the amount of the share capital (if any) need not be included, and that there will not, of course, be a statement that the liability of the members is limited (S. 2 (4)), nor will the name contain the word "Limited."

A model Memorandum of Association is reproduced in Appendix II at the end of this book.



## § 2.—Name of the Company.

In general, the promoters of a company may adopt any name that appears suitable to them, but this rule is subject to the following qualifications:—

(1) The name must end with the word “Limited,” unless the use of the word is dispensed with by licence of the Board of Trade (S. 18 (1)). Such a licence may be granted where the Board of Trade is satisfied that an association about to be formed as a limited company is:—

- (a) to be formed to promote commerce, art, science, religion, charity or any other useful object; *and*
- (b) intends (i) to apply its profits or other income in promoting its objects, *and* (ii) to prohibit the payment of any dividend to its members (S. 18 (1)).

The licence may, at the discretion of the Board of Trade, be granted subject to conditions (and may be required to be inserted in the Memorandum and/or Articles), and may be revoked at any time, provided that written notice is given to the company, which shall then be afforded an opportunity of opposing the revocation (S. 18 (4)). But a company to which a licence is issued enjoys all the privileges of an ordinary limited liability company (S. 18 (3)).

(2) Except with the consent of the Board of Trade, a company may not adopt a name which contains the word “Royal,” “Imperial,” “Municipal,” “Co-operative,” or “Chartered,” or which, in the opinion of the Registrar, suggests that it is patronised by any member of the Royal Family, or has any connection with His Majesty’s Government, any department thereof, any municipality or other local authority, or any body incorporated by Royal Charter (S. 17(2)).

(3) No company, other than one which is licensed to dispense with the word “Limited,” may adopt a name which includes the words “Chamber of Commerce” (S. 17 (1)).

(4) No company may adopt a name which contains the words “Building Society” (S. 17 (1)).

(5) The name must not be identical with that of a company already in existence or so nearly resembling such a name as to be calculated to deceive. But if the existing company is in the course of being wound up, the liquidator may consent to the adoption of its name by a new company (S. 17 (1)).

**Madame Tussaud & Sons v. Tussaud** [1890] 44 Ch.D. 678.

The plaintiff company had for many years carried on business as exhibitors of waxworks. In 1889, a certain Louis Tussaud promoted a company for a similar purpose, and proposed to call it "Louis Tussaud Limited." It was HELD that this name could not be adopted, as it was calculated to deceive the general public.

The restriction upon the use of a name similar to, or relatively similar to that of another applies whether that other is English or foreign, or whether it is a partnership or other legal association.

**Société Panhard et Levassor v. Panhard Levassor Motor**

**Co. Ltd.** [1901] 2 Ch. 513. In this case, the plaintiff company was registered in France and did not directly carry on business in England, but as its products were used in this country, it was HELD that the name of the defendant company must be altered, as it was calculated to deceive.

By virtue of the Moneylenders Act, 1927, a licence will not be granted to a company permitting it to carry on business as a moneylender under any name which contains the word "bank" or any name suggesting that it is carrying on a banking business.

Furthermore, by virtue of special statutory enactments, a restriction is placed upon usage of such words as "Red Cross," "Geneva Cross" or "Anzac" unless specific sanction is obtained.

The name, including the word "limited," must be :—

- (a) affixed to or painted on the outside of every office or place in which the company's business is carried on;
- (b) engraven on the company's seal;
- (c) mentioned in all notices, advertisements, bills, cheques, invoices, receipts, etc., of the company (S. 93 (1)).

Failure to comply with (a) *supra* will render the company and every officer in default liable to a penalty of £5 and £5 per day during the continuance of the default.

Failure to comply with (b) and (c) *supra* will render the company and every officer in default liable to a penalty of £50, and such officers may be personally liable, unless the debt is paid by the company, where a cheque or bill or order for goods is issued wherein the company's name is not correctly mentioned.

**Atkins & Co. Ltd. v. Wardle** [1889] 58 L.J.Q. 377. The directors of the South Shields Salt Water Baths Co. Limited, acting on the company's behalf, accepted a bill of exchange as "directors of the South Shields Salt Water Baths Company." It was HELD that, having omitted the word "Limited" from the company's name, the directors were personally liable.

But it is permissible to abbreviate the words "Company" and "Limited" (*Stacey & Co. Ltd. v. Wallis* [1912] 28 T.L.R. 209) for all purposes except in the Memorandum.

It may be added that any persons, not being incorporated as a limited liability company, who carry on trade or business under a name of which the last word is "Limited," are liable under the use of £5 a day (S. 364).  
to a fine of

#### Registration of Name.

§ 3.—**Alteration of Name.** By special resolution a Company may, with the approval of the BOARD OF TRADE, change its name (S. 19 (1)). The approval of the Board must be expressed in writing, and is in practice obtained before the resolution is put to the Company, in order to avoid the waste which would be entailed if the Board refused to approve of the name resolved upon by the Company.

The change of name must be notified to the Registrar, who will issue a NEW CERTIFICATE OF INCORPORATION, but the change does not in any way affect the Company's rights and liabilities (S. 19 (4), (5)).

Where a Company has been registered with a name which is either identical with or too nearly resembling that of an existing Company, the REGISTRAR OF COMPANIES may permit the name to be changed without the approval of the Board of Trade (S. 19 (2)).

The change of name does not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company; consequently any legal proceedings that might have been continued or commenced against it in its former name may be continued or commenced against it in its new name.

#### § 4.—The Registered Office.

In order that there may be an address to which notices and other communications may be sent, every company is required to have a Registered Office.

Consequently, by S. 92, the company must, as from—

- (a) the day on which it begins to carry on business; or
- (b) the 28th day after the date of its incorporation; whichever is the earlier, have a Registered Office (ss. 1).

Notice of—

- (i) the situation of the Registered Office, and
- (ii) any change therein,

must be given to the Registrar of Companies within 28 days after the date of incorporation, or of the change, as the case may be (ss. 2), the penalty being the default fine of £5.

In practice, notice of the situation is often filed with the other documents when registration is applied for.

The Memorandum states whether the registered office is to be established in England or Scotland, but does not (and need not) give its address. The situation may, therefore, be changed within the limits of the territory prescribed at the discretion of the company, without an alteration of the Memorandum. But the office may not be removed from the territorial area prescribed by the Memorandum. Thus, if the Memorandum states that the registered office will be situated in England, it may be changed from London to Liverpool, but not from London to Glasgow.

A document may be served on a company by leaving it at, or sending it to, the registered office, and where a company registered in Scotland carries on business in England, the process of any Court in England may be served at the principal place of business in England (S. 370). If a company has no Registered Office, service on the directors and the secretary at an unregistered office will suffice (*Fortune Copper Mining Co.* [1871] 10 Eq. 330).

### § 5.—The Objects Clause.

Although a company may, as a legal person, acquire rights and incur liabilities, its powers are less extensive than those of a real person, for whereas the latter has unlimited power to do any act which is not prohibited by law, **a company has power to do only that which it is authorised to do by its Memorandum.** This authority is given by the “objects clause,” which defines the purposes and powers of the company. The powers so defined are said to be *intra vires* the company, but if the company attempts to do anything which is beyond the powers defined by the Memorandum, the act is *ultra vires* and of no legal effect.

The POWERS of a company may be either EXPRESS OR IMPLIED. *Express* powers are set out specifically in the Memorandum, but in addition, every company has *implied* power to do "anything which may be regarded as fairly incidental to or consequential upon its objects." The extent of the implied powers necessarily depends upon the circumstances of each case, but it may be observed that it has been held that every trading company has implied power to:—

- (1) Borrow money (*General Auction Estate Co. v. Smith* [1891] 3 Ch. 432).
- (2) Give pensions to its servants (*Henderson v. Bank of Australasia* [1889] 40 Ch.D. 170).
- (3) Pay bonuses to its staff (*Hampson v. Prices Patent Candle Co.* [1876] 45 L.T.Ch. 437).

**Evans v. Brunner Mond & Co.** [1921] 1 Ch. 359. The defendant Company, which was engaged in manufacturing chemicals, proposed to devote a substantial sum of money to the encouragement of scientific education. It was proved that this act would ultimately benefit the company, but a shareholder objected on the ground that it was beyond the company's powers. It was HELD that the proposal was fairly incidental to the company's objects.

But in *Lee Behrens & Co., Ltd.* [1932] 48 T.L.R. 248, it was held that even if a company had power in its Memorandum to give pensions to former employees and their dependents, a payment of an annuity to the widow of a former managing director merely out of motive of mercy was illegal, as the power granted in the Memorandum must be exercised *bona fide* for the benefit or prosperity of the company and for purposes reasonably incidental to the company's business.

**Attorney-General v. London County Council** [1902] A.C. 165. The constitution of the London County Council authorised the Corporation to work and run tramways. The Corporation proposed to run buses in conjunction with, and in order to feed, the tramways, but it was HELD that it had no implied power to do so.

In view of the doctrine stated above, the importance of the objects clause of the Memorandum is manifest, and it is the practice to make these clauses as extensive as possible and to include a large number of powers which the company may never want to exercise. Occasionally, however, attempts have been made to dispute the validity of these widely extending clauses, but subject to the following qualifications, it

may be accepted that a company may exercise all or any of the powers expressly given by its Memorandum.

The qualifications referred to are as follows:—

(1) The Memorandum cannot authorise a company to do anything contrary to law. Thus, it has been held that it cannot authorise a Company to:—

- (a) Purchase its own shares (*Trevor v. Whitworth* [1888] 12 A.C. 409).
- (b) Issue shares at a discount (except under S. 47 of the Act) (*Ooregum Co. v. Roper* [1892] A.C. 125).
- (c) Work lotteries in England.
- (d) Pay dividends out of capital (*Lee v. Neuchatel Asphalte Co.* [1889] 45 Ch. D. 1).

The Registrar has the right to refuse to register a company whose objects include the sale of, dealing in and purchase of lottery and sweepstake tickets in England (*Ex parte More; Rex v. Registrar of Joint Stock Companies* [1931] W.N. 107).

(2) An attempt to obtain unlimited powers by providing that the company is to do “all such things as may be thought expedient” will not extend the company’s powers beyond those which would normally be implied (*re Raglan Hall Colliery Co.* [1870] 5 Ch. 356).

(3) A company which has a main object together with a number of subsidiary objects, cannot continue to pursue the subsidiary objects after the main object has come to an end.

**Re Amalgamated Syndicates** [1897] 2 Ch. 600. The company was formed to amalgamate three syndicates which had been incorporated for the purpose of speculating in seats for the Diamond Jubilee. The Memorandum authorised the company, *inter alia*, to act as company-promoters or house agents. After the Jubilee, the Directors proposed to pursue these subsidiary objects, but it was HELD that as the main object had come to an end, the company must be wound up.

But where the company has a number of distinct and separate main objects, it may pursue those which remain after one has come to an end (*Cotman v. Brougham* [1918] A.C. 514). Whether the remaining objects in such a case are separate main objects or merely subsidiary objects depends upon the wording of the Memorandum, but other circumstances may be

taken into consideration, e.g., the Memorandum may contain a final clause stating that each of the object clauses must be read independently of the others.

**Re Crown Bank Ltd.** [1890] 44 Ch. D. 634. The company was formed to (i) conduct banking business and (ii) lend money. It was HELD that in view of the company's name, it could not continue to act as a moneylender after ceasing to transact banking business.

As every person who has dealings with a company is conclusively presumed to have notice of the contents of the Memorandum, an *ultra vires* act is not binding on the company and is void. Nor can such an act be ratified, even by the unanimous vote of the company's members (*Ashbury Railway Carriage Co. v. Riche* [1875] L.R. 7 H.L. 653).

#### § 6.—What Companies may hold Land.

In general, every company has power to hold lands in any part of the United Kingdom, but in the case of companies formed to promote art, science, religion, charity, or any other similar object not involving the acquisition of gain by the company or by its individual members, not more than two ACRES of land may be held, unless a special licence is obtained from the Board of Trade (S. 14).

#### § 7.—How the Objects may be Altered.

Where a company finds it desirable to alter the terms of the objects of its Memorandum, it must pass a SPECIAL RESOLUTION, which must be CONFIRMED BY THE COURT; but no alteration may be made except to enable the company to:—

- (a) carry on its business more economically or efficiently;
- (b) attain its *main* purpose by new or improved means;
- (c) enlarge or change the *local* area of its operations;
- (d) carry on some business which under existing circumstances may conveniently or advantageously be combined with the company's business;
- (e) restrict or abandon any of the objects specified in the Memorandum;

- (f) sell or dispose of the whole or any part of its undertaking;
- (g) amalgamate with any other company or body of persons (S. 5 (1)).

The confirmation of the Court must be sought by petition; and, unless the Court dispenses with the requirement, notice of the proposed alteration must be given to (a) all debenture holders, and (b) all persons whose interests will be affected. Creditors, moreover, may claim a right to object to the proposed alteration, and if such an objection is upheld, the Court will not confirm the resolution until (a) the creditor consents, or (b) his claim has been discharged, or has determined, or has been secured (S. 5 (3)). In no case is the Court obliged to confirm a resolution, but in practice confirmation is rarely refused, provided that the alteration is within the scope of the Act.

Where the alteration is designed to enable the company to carry on a new business in conjunction with its existing business, it is for the company (not the Court) to determine whether the new business can be "conveniently or advantageously" combined with the existing business (*Parent Tyre Co.* [1923] 39 T.L.R. 426). It need not be shown that the new activity is one which is similar to the existing main object, but the Court will refuse its confirmation if the proposed new object is inconsistent with or destructive of the existing object.

**Re Cyclists' Touring Club** [1907] 1 Ch. 269. A company formed to promote and protect the interests of cyclists on the public roads, proposed to alter its Memorandum so as to enable it to extend its activities to the protection of motorists. It was HELD that the new object would be inconsistent with the original object and could not, therefore, be allowed.

In exercising its discretion, the Court must have regard to the rights and interests of creditors and members of the company, and may impose such terms and conditions as it thinks fit. It may, moreover, facilitate an arrangement for the purchase of a dissentient member's interest, but no part of the company's capital can be used for this purpose (S. 5 (5)).

An office copy of the order confirming the alteration, together with a printed copy of the Memorandum as altered, must, within 15 days after the date of the order, be filed with the registrar,



who will issue a certificate of registration. Such a certificate is conclusive evidence that the requirements of the Act have been complied with (S. 5 (6)).

It should be observed that S. 5 permits an alteration of any "provisions of the Memorandum with respect to the objects" and does not refer exclusively to the provisions of the objects clause (*Incorporated Glasgow Dental Co.* [1927] S.C. 400).

### § 8.—Limitation of Liability.

In the case of a limited liability company, the fourth clause of the Memorandum provides that the liability of the members shall be limited. In the absence of additional words, this means that no member shall be liable to contribute more than the nominal value of his shares.

The limited liability clause of a guarantee company provides that each member undertakes to contribute, if and when the company is wound up, such amount as may be required to pay the company's debts, "not exceeding" a maximum sum.

Occasionally it is provided by this clause that the liability of directors shall be unlimited, in which case special notice of the provision must be given in writing to every person who is invited to join the Board (S. 146).

If authorised by its Articles, a limited company may, by special resolution, alter its Memorandum so as to render unlimited the liability of its directors or managers, or of any managing director (S. 147); but except to this extent, the limited liability clause does not appear to be capable of alteration. If, however, the number of members of the company falls below the statutory minimum (i.e. seven in a public and two in a private company) and the company carries on business without increasing its membership, after a period of six months all the remaining members who are aware of the contravention will become fully liable for the company's debts created after the expiration of the six months (S. 28).

### § 9.—Capital Clause.

The amount of the company's authorised or nominal capital, the manner in which it is divided into shares, and the nominal value of these shares, must be stated in the Memorandum.

Where the capital is to be divided into shares of different classes, e.g. ordinary and preference shares, it is usual to show this division in the Memorandum and, in addition, the rights of the shareholders may be set out therein. The subject of capital and shares will be fully dealt with in a later chapter.

As an exception to the rule given above, the capital clause of an *unlimited* company having a share capital must be stated in the *Articles*.

### § 10.—Nature of the Articles.

The Memorandum of Association defines the company's powers and objects, but it does not describe the procedure by which the powers are to be exercised or the objects achieved. By reason of a company's artificial origin, it is necessary to have elaborate regulations for the conduct of its business. The powers of the shareholders and the manner in which they can be exercised (viz. at general meetings) must be defined; provision must be made for the appointment of directors and managers; the functions of these officers must be explained, and control over their actions be established. These and numberless other INTERNAL REGULATIONS are contained in the Articles of Association.

The Articles are subordinate to the Memorandum, and cannot extend the company's powers beyond the sphere defined by the Memorandum, but they are to be read in conjunction with the dominant instrument, which they frequently explain.

### § 11.—Form and Contents of Articles.

Articles of Association must be (a) printed, (b) divided into numbered paragraphs, (c) stamped as a deed and (d) signed by the persons who subscribe to the Memorandum, in the presence of a witness, who must himself attest (S. 9). Private, unlimited and guarantee companies must register special Articles drafted to suit their particular requirements (S. 6); but a public company limited by shares may adopt "Table A" instead of registering special Articles (S. 8).

Table A is a model set of Articles set out in the First Schedule of the Act reproduced in Appendix I at the end of this book, and all or any of its provisions may be adopted; but as it does not fulfil the peculiar requirements of private, unlimited and

guarantee companies, only a *public* company limited by shares can adopt the Table in its entirety, and dispense with special Articles. Moreover, in the case of a company limited by shares, the provisions of Table A are applicable as the company's regulations, except in so far as they are excluded or modified by the special Articles (S. 8 (2)).

The Table A attached to the Companies Act, 1929, differs in many respects from that which is attached to the Companies (Consolidation) Act, 1908, and it is, therefore, important to note that it applies only to companies registered after the commencement of the Act. Companies registered before that date continue to be governed by Table A of the Act of 1908, in so far as it is applicable (S. 8).

It appears that, where special Articles are registered and *Table A is specifically excluded* thereby, the provisions of Table A do not apply if the Articles are silent on any point at issue. In such cases, an amendment of the Articles by Special Resolution would have to be made to deal with the matter. But to this rule there is an exception, for S. 115 (1) of the Act provides that, where the Articles are silent, NOTICE OF MEETINGS shall be given to members in accordance with the provisions of TABLE A.

## § 12.—Effect of Memorandum and Articles.

The Articles of a company contain the terms of a contract as between the company and its members, which is enforceable like any other contract. Thus, in *Oakbank Oil Co. v. Crum* [1883] 8 A.C. 65, a shareholder was held to be entitled as against the company to the strict observance of the Articles with reference to the payment of dividends, so long as they remained unaltered. Again, from the company's viewpoint, it was held in *Bradford Banking Company v. Briggs* [1886] 12 A.C. 29, that where the Articles give the company a first and paramount lien on its shares, a member cannot deny the company's right to exercise the lien; and in *Imperial Hydropathic Co. v. Hampson* [1883] 23 Ch. D. 1, that the company can restrain its members from committing breaches of the regulations contained in the Articles.

By virtue of the Articles, however, the company is only bound by the contract implied therein, to its members AS

SUCH, and not to a member in any other capacity. Thus, in *Browne v. La Trinidad* [1888] 37 Ch. D. 1, the Articles of a company purported to adopt a preliminary contract appointing the plaintiff a director, with no liability to be removed before a certain date. Although the plaintiff subsequently became a member, it was held that he had no right of action on the Articles upon dismissal before the due date. But where an independent contract is entered into between a company and a member, the Articles may be pleaded as evidence of the terms of such contract.

**Swabey v. Port Darwin Gold Co.** [1889] 1 May. 385. The Articles provided that every director should receive a specified sum per annum by way of remuneration. In July the company passed a special resolution reducing this sum as from the end of the preceding year. The plaintiff immediately resigned, and it was HELD that he was entitled to sue for remuneration up to the date of his resignation, calculated at the rate specified by the Articles. The action was not an action upon the Articles, but upon an implied contract of service at the rate of remuneration specified in the Articles.

The Articles, apart from their binding effect on the company, also regulate the rights of members *inter se*. Thus, in *Hickman v. Kent and Romney Marsh Association* [1915] 1 Ch. D. 881, it was held that, where an Article provided for submission to arbitration, the Articles were binding upon members as if each had made and signed a submission in writing within the terms of the Arbitration Act, 1889.

The Articles are confined in their application to the company and its members and can give no contractual rights or impose liabilities on outsiders, even though they be servants or agents of the company or even if named in the Articles.

**Eley v. Positive Government Assurance Co.** [1876], 1 Ex. D. 88. The Articles of Association provided that E should be the company's solicitor, and should not be removed from office except for misconduct. E took office and became a shareholder, but was dismissed by the company without misconduct having been alleged. E sued the company for damages for their breach of the regulations in the Articles, but the Court HELD that no such action would lie.

As the Articles, together with the Memorandum, are public documents which anybody may inspect, *every person who has dealings with a company is conclusively presumed to be aware of their contents*. For this reason, such a person cannot deny

that he has knowledge of (a) the powers of the company as expressed in the Memorandum, or (b) the powers of the directors as expressed in the Articles. But although a person who has dealings with a Company is presumed to be aware of the regulations contained in the Articles, he may, in general, assume that these regulations have been observed, and is not required to ascertain whether the directors are exercising their powers in a proper manner.

**Royal British Bank v. Turquand** [1856] 6 Ex B. 327. The company had power to borrow, but the deed of settlement provided that the directors should obtain the sanction of the company by resolution before exercising the power. The directors borrowed money from T without obtaining the necessary sanction, and the company was held liable. T was deemed to be aware that the directors required sanction before exercising the borrowing powers, but in the absence of evidence to the contrary, he was entitled to assume that the necessary sanction had been obtained.

This is the rule in *Royal British Bank v. Turquand* in its primitive form, but as a result of subsequent decisions, the rule must now be read with the three following qualifications:—

(1) A person who knows, or ought to know, that the regulations in the Articles have not been observed, cannot set up the rule:—

**Howard v. Patent Ivory Co.** [1888] 38 Ch D. 156. The Articles authorised directors to borrow on behalf of the company, but restricted the aggregate amount to £1,000, unless a special resolution was obtained. The directors, without obtaining a special resolution, lent the company £3,000, and it was HELD that the company was not liable for the amount by which the loan exceeded £1,000.

(2) Where the circumstances are such that the need for special enquiry is indicated, a person cannot rely upon the rule. \*

**Houghton & Co. v. Nothard, Lowe & Wills** [1927] 1 K.B. 246. X, who was a director of the A and B Companies, without authority, pledged the goods of the B Company as security for the A Company's debt. The Articles of the B Company authorised the directors to delegate their powers to any one of their number, and the holder of the security contended that, under the rule in *Royal British Bank v. Turquand*, he was entitled to assume that authority to pledge the Company's goods had been delegated to X. It was HELD, however, that as the circumstances were sufficiently peculiar to put the pledgee on enquiry, he could not rely upon the rule.

(3) The rule will not enable a person to sue the company upon an instrument which bears a forged signature.

**Ruben v. Great Fingall Consolidated** [1906] A.C. 439.

The plaintiff advanced money to the secretary of a company upon the security of a share certificate which, unknown to him, bore the forged signatures of two directors. It was HELD that the Company was not bound by the certificate.

**Kreditbank Cassel v. Schenkers Ltd.** [1927] 1 K.B. 826.

The Articles of the defendant company authorised the directors to delegate their power to draw bills of exchange on behalf of the company. Without authority, a branch manager drew a bill in the name of the company for his private purposes. It was HELD that as the drawer's signature was a forgery, the company was not liable.

This latter decision must be compared with that in *British Thomson-Houston Co. v. Federated European Bank* [1932] 2 K.B. 176. In this case, a director without authority signed a guarantee for and on behalf of the company. The Articles empowered the directors to delegate their powers to any one of their number, and, applying the rule in *Turquand's Case*, the Court held that the company was bound by the guarantee. This decision was arrived at because the director who signed the guarantee was acting in a manner in which a director would normally have power to act. The case is, therefore, distinguishable from *Kreditbank Cassel v. Schenkers Ltd.*

**An act which is *ultra vires* the company** (i.e. beyond the powers conferred by the Memorandum) **cannot in any circumstances be rendered valid by the members**, but where the directors exercise a power of the company improperly (e.g. without obtaining the sanction required by the Articles), their action may be rendered valid by a subsequent ratification. In general, a resolution of the shareholders in general meeting is necessary to ratify an act which is *ultra vires* the directors, but if every member of the company assents to the conduct of the directors, the company will be bound, notwithstanding that no formal meeting has been held (*Parker & Cooper, Ltd. v. Reading & James* [1926] 136 L.T. 117).

### § 13.—Alteration of Articles.

Subject to the provisions of the Act and the conditions of the company's Memorandum, the Articles may at any time be altered or added to by special resolution of the company (S. 10). The power to alter is a wide one, and cannot be nullified by any provision in the Memorandum or Articles

(*Andrews v. Gas Meter Co.* [1897] 1 Ch. 361). But the power is subject to the following limitations:—

(1) The Articles cannot be altered so as to give the company power to do something which is *ultra vires* the Memorandum (*Guinness v. Land Corporation of Ireland* [1883] 22 Ch.D. 349).

(2) The Articles cannot be altered so as to take away from the members a statutory right, e.g. the right to petition for a winding up order (*Peperil Gold Mines Ltd.* [1898] 1 Ch. 122).

(3) The Articles cannot be altered so as to constitute a fraud upon a minority of the company's shareholders.

This last rule does not mean that no alteration is permitted which is likely to prove disadvantageous to a minority, for such an alteration will not necessarily constitute a fraud. The line which divides alterations which are fraudulent from alterations which are not is somewhat obscure, but if the majority act in good faith and for the benefit of the company as a whole, the alteration will not be set aside as fraudulent, even if it inflicts a hardship upon the minority. Moreover, it is for the company and not for the Court to decide whether the alteration is for the benefit of the company as a whole, so that the Court will not interfere with the decision of the majority, unless they are of opinion that there are circumstances which show clearly that the majority were not acting in good faith (*Shuttleworth v. Cox Bros. & Co. (Maidenhead)* [1927] 43 T.L.R. 83).

**Menier v. Hooper's Telegraph Works** [1874] L.R. 9 Ch. 350.

In this case, two companies were involved. No. 1 Company had a right of action against No. 2 Company, but as the majority of the members of No. 1 Company were also members of No. 2 Company, it was resolved to settle the action. The terms of the settlement were, however, unfavourable to No. 1 Company, and upon the application of the minority of the members, the Court set the resolution aside, as the majority had had regard to the benefit of No. 2 Company rather than to that of No. 1 Company.

**Allen v. Gold Reefs Ltd.** [1900] 1 Ch. 656. The Articles were altered so as to give the company a lien over the plaintiff's shares. It was HELD that as the lien was for the benefit of the company as a whole, the alteration was valid, notwithstanding that in effect it was retrospective and to the plaintiff's disadvantage.

(4) No member of a company can be bound by an alteration of the Memorandum or Articles made after the date on which

he became a member, if the alteration requires him to increase his holding of shares or increases his liability to pay money to the company, *unless* before or after the alteration he agrees in writing to be bound (S. 22).

The Articles cannot be made unalterable by a provision contained therein, but where a contract between the company and an outsider provides that the Articles shall not be altered, the Court may by injunction restrain the company from committing a breach of the contract by altering the Articles.

**British Murac Syndicate v. Alperton Rubber Co.** [1915] 2 Ch. 195. The plaintiffs entered into a contract with the defendant company, whereby it was agreed that so long as the plaintiffs held 5,000 of the company's shares, they should have the right to nominate two of the directors. It was also agreed that a clause in the Articles, providing for this right of nomination, should not be altered by the company. The company disapproved of the plaintiffs' nominees, and notice was given of a meeting at which it was proposed to pass a resolution altering the Articles and depriving the plaintiffs of their right to nominate. It was HELD that the Court had power to issue an injunction restraining the company from altering its Articles, where the alteration would constitute a deliberate breach of a contract with an outsider.

In the foregoing case, it was expressly provided that the Articles should not be altered, but where no such provision is made, it seems that, as contracting parties are presumed to be aware that the Articles are subject to alteration, an injunction cannot be obtained (*Page v. Liverpool Victoria Friendly Society* [1927] 43 T.L.R. 712).

How far the principle enunciated above can be extended to the contracts made between a company and its members, *as members*, is far from clear. It has been held that an alteration of the Articles cannot take away rights which have accrued to a shareholder *prior* to the date of the alteration.

**McArthur Ltd. v. Gulf Line Co.** [1909] S.C. 732. X, who was indebted to the company, transferred his shares to the plaintiffs. The Articles were subsequently altered to give the company a lien over its shares. It was HELD that as the transfer had been lodged before the alteration, the lien could not be exercised in respect of X's liability.

But in *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656, the Court refused to grant an injunction where the company proposed to take a right of lien over fully paid shares, all of which were vested in the personal representative of a deceased shareholder, whose estate was indebted to the company.



**§ 14.—Who is Entitled to Copies of Memorandum and Articles.**

Every member of a Company is entitled to be sent on request :

- (a) on payment of not more than 1s., a copy of the Memorandum and Articles (if any); and
- (b) on payment of not more than the published price thereof, a copy of any Act of Parliament which alters the Memorandum (S. 23).

Every copy of the Memorandum issued after an alteration thereof must be in accordance with the alteration (S. 24 (1)).

In addition, any person may inspect the documents kept by the Registrar of Companies on payment of a fee of 1s., and may obtain certified copies on payment of 6d. a folio.

## ABSTRACT OF CHAPTER V

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### THE PROSPECTUS

- § 1.—THE NATURE OF A PROSPECTUS.
- § 2.—REGISTRATION OF THE PROSPECTUS.
- § 3.—CONTENTS OF THE PROSPECTUS.
- § 4.—CONSEQUENCES OF NON-DISCLOSURE IN A PROSPECTUS.
- § 5.—CONSEQUENCES OF MISREPRESENTATION IN A PROSPECTUS.
- § 6.—DAMAGES FOR MISREPRESENTATION IN A PROSPECTUS.
- § 7.—STATEMENT IN LIEU OF PROSPECTUS.
- § 8.—RESTRICTIONS ON OFFERS OF SHARES.
- § 9.—OFFERS OF SHARES BY FOREIGN COMPANIES.



## CHAPTER V

# THE PROSPECTUS

### § 1.—The Nature of a Prospectus.

The capital required to enable a newly formed company to commence business may be subscribed privately or by the public. Where sufficient private subscribers are not forthcoming, it is necessary to induce the public to supply the requisite capital, and for this purpose an invitation must be issued. These appeals to the public are the subject of stringent statutory restrictions, designed to protect the unwary from the wiles of fraudulent promoters.

In view of the onerous obligations attached to the issue of a prospectus and the liability for misrepresentation of terms contained therein, it is most important to ascertain whether any particular instrument covering an offer of shares or debentures is a prospectus. A prospectus is defined by S. 380 as "any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company." Apart from the essential that the instrument to constitute a prospectus must contain an invitation to "the public," little help is afforded by this statutory definition.

In *Sleigh v. Glasgow and Transvaal Options* [1904] Ct. of Sess., a circular sent to the friends, limited to forty, of the proposed directors, with an intention to be shown to their friends, was held not to be an invitation to the public; and in *Sherwell v. Combined Incandescent Mantles Syndicate* [1907] W.N. 110, the printing of a thousand copies of a prospectus and the distribution of two hundred of them by the directors amongst the friends of the directors and promoters, was similarly considered not to be a public invitation. Warrington, J., in this case held that an offer of shares, to come within the provisions of Ss. 34 and 35, must be made by or on behalf of the company, and further prescribed that a *prima facie* test of a public invitation was whether the terms of the invitation were such that, despite its limited circulation, it invited any person who so chose to come in and take up the shares.

Further, in *Booth v. New Afrikaner Gold Mining Co.* [1903] 1 Ch. 295, there was no invitation to the public, where, under a scheme of reconstruction, a circular offered shares in the new company to the members of the old company; but in *re South of England Natural Gas Co.* [1911] 1 Ch. 573, the distribution amongst the members of certain companies of a circular marked "for private circulation only," which also contained a statement that a copy had been filed with the Registrar, was held to constitute an invitation to the public.

Finally, in *Nash v. Lynde* [1929] A.C. 158, the sending of a circular together with an application form to a solicitor, stating that he might bring it to the notice of his clients, was held to be a prospectus, but there was no liability to comply with S. 35, since the invitation was not issued by or on behalf of the company.

Prior to 1929 it had become customary among some promoters and others to avoid the statutory restrictions on the issue of prospectuses by allotting shares to an issuing house, and leaving the issuing house to invite the public to purchase the shares so allotted. These "offers for sale" were not prospectuses issued by or on behalf of the company or its promoters, and were not therefore required to contain the particulars which had to be included in prospectuses so issued; but this ingenious evasion is no longer possible, for it is provided by S. 38, Companies Act, 1929, that where a company allots or agrees to allot shares or debentures with a view to their being offered for sale to the public, any document by which the offer for sale is made *shall for all purposes be deemed to be a prospectus issued by the company*. In addition, if (a) an offer for sale is made within six months after an allotment, or (b) at the date of the offer the whole of the consideration to be received by the company has not been received, it will be presumed, unless the contrary is proved, that the allotment or agreement to allot was made with a view to an offer for sale to the public (S. 38 (2)).

## § 2.—Registration of the Prospectus.

Every prospectus issued by or on behalf of a company or in relation to an intended company must be dated, and a copy thereof, signed by every person named therein

as a director or proposed director (or by his agent authorised, in writing), must be filed for registration on or before the date of publication. The prospectus must state on the face of it that a copy has been filed for registration, and no prospectus may be issued until a copy has been filed (S. 34 (5)). An offer for sale must be registered in a like manner, the copy filed being signed by the persons making the offer; but where the offer is made by a company or firm, two of the directors or not less than half of the partners must sign and any such director or partner may sign by his agent appointed in writing (S. 38 (4)).

### § 3.—Contents of the Prospectus.

The contract entered into between a company and its shareholders is a contract *uberrimæ fidei*, and each party is therefore under a common law duty to make known to the other any material facts which may affect the other's decision to enter into the contract. But the common law duty has been materially strengthened by the Act which compels promoters to reveal a number of things concerning the Company's history and prospects in every prospectus that is issued

- (a) by or on behalf of a company; or
- (b) by or on behalf of any person who is or has been engaged or interested in the formation of the company (S. 35).

These particulars are set out in the Fourth Schedule of the Companies Act, 1929, which reads as follows:—

## PART I

### MATTERS REQUIRED TO BE STATED IN PROSPECTUS

(1) *Except where the prospectus is published as a newspaper advertisement, the contents of the MEMORANDUM, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively.* [See Ch. IV, § 1.]

(2) *The number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company.* [See Ch. VI, § 12.]

(3) *The number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors.* [See Ch. X, §§ 3 and 6.]

(4) The *names, descriptions, and addresses of the directors or proposed directors.*

(5) *Where shares are offered to the public for subscription* particulars as to—

(i) the *minimum amount which*, in the opinion of the directors, *must be raised by the issue of those shares* in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of the following matters:—

(a) the *purchase price of any property* purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(b) any *preliminary expenses* payable by the company, and any *commission* so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company;

(c) the *repayment of any moneys borrowed* by the company in respect of any of the foregoing matters;

(d) WORKING CAPITAL; and

(ii) the amounts to be provided in respect of the matters aforesaid *otherwise than out of the proceeds of the issue* and the sources out of which those amounts are to be provided. [See Ch. VI, § 13.]

(6) The *amount payable on application and allotment* on each share, and, in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, the amount actually allotted, and the amount, if any, paid on the shares so allotted. [See Ch. VI, § 13.]

(7) The number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up *otherwise than in cash*, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued.

(8) The names and addresses of the VENDORS OF ANY PROPERTY purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor. [See § 3 *ante*.]

(9) The amount, if any, paid or payable as *purchase money* in cash, shares, or debentures, for any such property as aforesaid, specifying the amount, if any, payable for goodwill.

(10) The amount, if any, paid within the two preceding years, or payable, as *commission* (but not including commission to sub-underwriters) for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission. [See Ch. VI, § 17.]

(11) The amount or estimated amount of *preliminary expenses*.

(12) *The amount paid* within the two preceding years, or intended to be paid *to any promoter, and the consideration* for any such payment.

(13) The dates of and parties to every MATERIAL CONTRACT, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or a contract entered into more than two years before the date of issue of the prospectus, and a reasonable time and place at which any such material contract or a copy thereof may be inspected.

(14) The names and addresses of the *auditors*, if any, of the company.

(15) Full particulars of the *nature and extent of the interest*, if any, of *every director* in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in



cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company. [See Ch. X, § 8.]

(16) If the prospectus invites the public to subscribe for shares in the company and the share capital of the company is divided into different classes of shares, *the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares* respectively. [See Ch. VI, §§ 10, 11 and 12.]

(17) In the case of a company which has been carrying on business, or of a business which has been carried on *for less than three years, the length of time during which the business* of the company or the business to be acquired, as the case may be, *has been carried on.*

## PART II

### REPORTS TO BE SET OUT IN PROSPECTUS

(1) A report by the auditors of the company with respect to the *profits of the company* in respect of each of the three **financial years** immediately preceding the issue of the prospectus, and with respect to the *rates of the dividends*, if any, paid by the company in respect of each class of shares in the company in respect of each of the said three years, giving particulars of each such class of shares on which such dividends have been paid and particulars of the cases in which no dividends have been paid in respect of any class of shares in respect of any of those years, and, if no accounts have been made up in respect of any part of the period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact.

(2) If the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by accountants who shall be named in the prospectus upon the *profits of the business* in respect of each of the three financial years immediately preceding the issue of the prospectus.

In the case of a prospectus issued more than two years after the date at which the company is entitled to commence business,

the provisions of this Schedule with respect to the memorandum and the qualification, remuneration and interest of directors, the names, descriptions and addresses of directors or proposed directors, and the amount or estimated amount of the preliminary expenses, do not apply; and it appears that none of the provisions are applicable to a prospectus or form of application issued to existing members or debenture-holders, even where an applicant for the shares or debentures offered will have the right to renounce in favour of other persons (S. 35 (5)). In other cases, it is unlawful to issue any form of application for shares in or debentures of a company, unless the form is issued:—

- (a) with a prospectus which complies with the requirements of the Act; or
- (b) in connection with a *bona fide* invitation to a person to enter into an underwriting agreement; or
- (c) in relation to shares or debentures which are not offered to the public (S. 35 (3)).

Every person shall, for the purposes of the Schedule, be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where:—

- (a) the purchase money is not fully paid at the date of the issue of the prospectus; or
- (b) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or
- (c) the contract depends for its validity or fulfilment on the result of that issue;

and where any property to be acquired by the company is to be taken on lease, the Schedule shall have effect as if the expression “vendor” included the lessor, and the expression “purchase money” included the consideration for the lease, and the expression “sub-purchaser” included a sub-lessee.

For the purposes of paragraph 8 of Part I of the Schedule, where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors.

If in the case of a company which has been carrying on business, or of a business which has been carried on for less than three years, the accounts of the company or business have only been made up in respect of two years or one year, Part II of the Schedule shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years.

The expression "financial year" in Part II of the Schedule means the year in respect of which the accounts of the company or of the business, as the case may be, are made up; and where by reason of any alteration of the date on which the financial year of the company or business terminates, the accounts of the company or business have been made up for a period greater or less than a year, that greater or less period shall for the purpose of the said Part of the Schedule be deemed to be a financial year (Part III of the Schedule).

A prospectus which takes the form of an OFFER FOR SALE to the public must contain, in addition to the particulars prescribed in the Fourth Schedule:

- (a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates; and
- (b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected (S. 38 (3)).

#### § 4.—Consequences of Non-disclosure in a Prospectus.

The precise effect of an omission from a prospectus of those matters which by S. 35 and the Fourth Schedule ought to be included, is by no means as clear as could be desired. That there is a liability is seemed to be implied, for S. 35 (4) provides that in the event of non-compliance with or contravention of any of the requirements of that section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if:

- (i) as regards any matter not disclosed, he proves he was not cognisant thereof; or
- (ii) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part; or

- (iii) the non-compliance or contravention was in respect of matters which in the opinion of the Court were immaterial, or was otherwise such as, in the opinion of the Court, having regard to all the circumstances, ought reasonably to be excused.

But in the event of failure to disclose the nature and extent of a director's interest in the promotion of or property to be acquired by the company, no director or other person will incur liability unless it be proved that he had knowledge of the matters not disclosed.

The liability which would appear to be implied by S. 35 is a liability in damages only, and it has been held in the case *South of England Natural Gas, etc. Co.* [1911] 1 Ch. 573, that, where there is a default in compliance with the requirements of S. 35, an aggrieved shareholder may not, for this reason alone, rescind his contract.

It may so happen, however, in a particular case that a non-disclosure may cause a misrepresentation by effecting a falsity in that which is disclosed, and in such circumstances an aggrieved shareholder has all the remedies, including rescission, which are ordinarily available for misrepresentation arising in a prospectus; but unless there is a misrepresentation there can be no rescission (*Wimbledon Olympia, Ltd.* [1910] 1 Ch. 630).

### § 5.—Consequences of Misrepresentation in a Prospectus.

A misrepresentation in a prospectus will enable a person who takes shares on the faith of the untrue statements to rescind the contract, provided that:

- (a) the statements are MATERIAL and of FACT; and
- (b) the right to RESCIND is exercised WITHIN A REASONABLE TIME of the discovery of the untruth AND BEFORE WINDING UP proceedings are commenced.

This remedy is enjoyed only where the false statement is a misrepresentation of *fact*. Thus, if the prospectus states that a certain thing is going to be done, and it is not done, this will not supply the ground for a rescission (*Beattie v. Lord Ebury* [1874] 7 Ch. 804); but if the opinion of an expert is mis-quoted, this will be a false statement of fact (*Edgington v. Fitzmaurice* [1885] 29 C.D. 483). Moreover, where the prospectus contains a true

copy of an expert's report, the contract to take shares may be rescinded if the report does not contain the expert's real opinion, unless the company expressly states that it does not guarantee the accuracy of the report (*Mair v. Rio Grande Rubber Estates* [1913] A.C. 853).

The right to rescind entitles the party misled to have his name removed from the company's register and to have refunded to him the amount which he has paid for the shares, with 4 per cent. per annum interest (*Karberg's Case* [1892] 3 Ch. 1); but the right will be lost if the shareholder adopts the contract after discovering the false statement, e.g. by voting at a meeting of shareholders, or if it is not exercised until after the commencement of the company's liquidation (*Tennent v. City of Glasgow Bank* [1879] 4 A.C. 615).

#### § 6.—Damages for Misrepresentation in a Prospectus.

Apart from the right to rescind, the Act provides that directors, and persons who have authorised themselves to be named as directors, promoters, and all persons who have authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for shares or debentures on the faith of a prospectus, for any loss or damage suffered by reason of any untrue statement therein, unless it is proved that:—

- (a) having consented to become a director of the company, he *withdrew his consent before the issue of the prospectus*, and it was issued without his authority or consent; or
- (b) *the prospectus was issued without his knowledge or consent*, and on becoming aware of its issue, he forthwith gave *reasonable public notice* that it was issued without his knowledge or consent; or
- (c) *after the issue of the prospectus and before allotment thereunder*, he, on becoming aware of any untrue statement therein, *withdrew his consent thereto, and gave reasonable public notice* of the withdrawal, and of the reason therefor; or
- (d) (i) as regards every untrue statement *not purporting to be made on the authority of an expert or of a public official document or statement*, he had *reasonable ground to believe*, and did up to the time of the allotment

*of the shares or debentures, as the case may be, believe, that the statement was true; and*

- (ii) *as regards every untrue statement purporting to be a statement by an expert or contained in what purports to be a copy of or extract from a report or valuation of an expert, it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation; and*
- (iii) *as regards every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document* (S. 37 (1)).

The foregoing rules are applicable to innocent as well as to fraudulent misrepresentations, so that the Act provides an exception to the rule of the common law that damages are not recoverable on the ground of an innocent misrepresentation (*Derry v. Peek* [1889] 14 A.C. 337). On the other hand, if a director is compelled to pay damages under the section, he is entitled to recover contributions from his co-directors if they, too, are guilty of misrepresentation (S. 37 (3)); or from their estates after their decease (*Shepherd v. Bray* [1907] 2 Ch. 571).

No action for misrepresentation will lie, however, unless the plaintiff is able to prove that it was the false statement complained of which induced him to apply for the shares of the company. The right of action is, therefore, strictly confined to the original allottee of the shares (*Peek v. Gurney* [1874] L.R. 6. H.L. 377); though there is one case in which a purchaser of shares sued with success on the ground that the prospectus by which he was misled was intended to induce people to buy the company's shares in the market (*Andrews v. Mockford* [1896] 1 Q.B. 372).

A condition in a prospectus requiring or binding an applicant for shares or debentures to waive compliance with any requirement of the Act, as to the contents of a prospectus, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, is void (S. 35 (2)).

**Greenwood v. Leathershod Wheel Co.** [1900] 1 Ch. 421. In this case, a prospectus stated that there were possibly contracts which ought to have been referred to, but which had been omitted, and made it a condition of the offer that any subscriber should be deemed to have waived his rights to have particulars of these contracts. Such a condition is now void and of no legal effect.

Whether an action for damages suffered on account of false statements in a prospectus can be maintained against a company as distinct from its directors has not yet been determined, but where the misrepresentations complained of are *fraudulent*, it is possible that such an action might lie, as a company is liable for the torts of its agents committed in the course of their employment (*Mersey Dock Trustees v. Gibb* [1866] L.R.1. H.L. 93). According to the decision in *Houldsworth v. Glasgow Bank* [1880] L.R. 5. A.C. 317, a shareholder cannot both retain his shares and get damages *against the company*.

### § 7.—Statement in lieu of Prospectus.

A public company having a share capital which does not issue a prospectus inviting the public to subscribe for or purchase its shares, cannot allot any of its shares or debentures unless at least three days before the *first allotment*, there is filed for registration a statement in lieu of prospectus, signed by every person who is named therein as a director or proposed director, or by his agent authorised in writing (S. 40 (1)). This statement must be in the form prescribed by the Fifth Schedule to the Act which is reproduced in Appendix IV at the end of this book.

Failure to comply with this requirement will render the company and every director who knowingly authorises or permits the contravention liable to a fine not exceeding £100 (S. 40 (3)). But the section does not apply to private companies (S. 40 (2)).

If the statement in lieu of prospectus contains false statements, it seems that a person who applies for an allotment of shares on the faith of the statements has the same right to rescind that he would have enjoyed if the misrepresentations had been made in a prospectus (*Blair Open Hearth Co.* [1914] 1 Ch. 390). But an allotment is not void solely on account of the untrue statements, nor will the directors be liable to pay damages under S. 35, though they may incur the criminal penalty prescribed by S. 40 (3).

**Re Burton & Son** [1927] 2 Ch.D. Shares in a company were allotted to A, who transferred them to B before the statement in lieu of prospectus had been filed. B presented the transfer to the company after such statement had been filed, and received a certificate for the shares. Later he accepted a bonus from the company and attended a meeting of shareholders. HELD that although the original allotment to A was void, B was a member of the company, and by accepting such benefits of membership, he was estopped from denying that he was a member.

### § 8.—Restrictions on Offers of Shares.

In the past, considerable suffering was caused to incautious members of the public by the practice of hawking worthless shares from door to door, and with the object of putting an end to this practice, the Companies Act, 1929, provides that it shall be unlawful for any person to go from house to house offering shares for subscription or purchase (S. 356 (1)). These verbal offers are absolutely unlawful, but the section also prohibits offers in writing of shares for purchase unless:

- (a) the person to whom the offer is made is a person whose *ordinary business* it is to buy or sell shares; or
- (b) the offer is accompanied by a *statement in writing* in the form prescribed by the section and signed by the person making the offer; or
- (c) the shares to which the offer relates are shares which are *quoted on, or in respect of which permission to deal has been granted by, any recognised stock exchange in Great Britain*, and the offer so states and specifies the stock exchange; or
- (d) the shares to which the offer relates are shares which a company has *allotted or agreed to allot with a view to their being offered for sale to the public*; or
- (e) the offer is made only to *persons with whom the person making the offer has been in the habit of doing regular business* in the purchase or sale of shares (S. 356 (2)).

The written statement prescribed in paragraph (b) above must contain the following particulars and no others:—

- (a) whether the person making the offer is acting as PRINCIPAL OR AGENT, and if as agent, the name of his principal and an address in Great Britain where that principal can be served with process;



- (b) the date on which and the COUNTRY in which the company was INCORPORATED, and the address of its registered or principal office in Great Britain;
- (c) the AUTHORISED SHARE CAPITAL of the company and the amount thereof which has been issued, the classes into which it is divided and the RIGHTS of each class OF SHAREHOLDERS in respect of capital, dividends and voting;
- (d) the DIVIDENDS, if any, paid by the company on each class of shares during each of the three financial years immediately preceding the offer, and if no dividend had been paid in respect of shares of any particular class during any of those years, a statement to that effect;
- (e) the total amount of any DEBENTURES issued by the company, and outstanding at the date of the statement, together with the rate of interest payable thereon;
- (f) the names and addresses of the DIRECTORS of the company;
- (g) whether or not the shares offered are fully paid up, and, if not, to what extent they are PAID UP;
- (h) Whether or not the shares are QUOTED ON, or permission to deal therein has been granted by, any RECOGNISED STOCK EXCHANGE in Great Britain or elsewhere, and, if so, which, and, if not, a statement that they are not so quoted or that no such permission has been granted;
- (i) where the offer relates to UNITS, particulars of the name and addresses of the persons in whom the shares represented by the units are vested, the date of and the parties to any document defining the TERMS on which those shares are held, and an address in Great Britain where that DOCUMENT or a copy thereof can be inspected.

If any person acts, or incites any person to act, in contravention of this Section, he will be liable to imprisonment for a term not exceeding six months, or to a fine not exceeding £200, or to both imprisonment and fine, and in the case of a second or subsequent offence, to imprisonment for a term not exceeding twelve months or to a fine not exceeding £500, or to both imprisonment and fine; while if the offender is a company,

every director and every officer concerned in the management of the company shall be guilty of the like offence, unless he proves that the act constituting the offence took place without his knowledge or consent.

In this Section, unless the context otherwise requires, the expression "shares" means the shares of a company, whether a company within the meaning of the Act or not, and includes debentures and units, the expression "unit" meaning any right or interest in a share, and for the purposes of this section, a person shall not in relation to a company be regarded as not being a member of the public by reason only that he is a holder of shares in the company, or a purchaser of goods from the company (S. 356 (7)).

### § 9.—Offers of Shares by Foreign Companies.

The issue in Great Britain of a prospectus offering for subscription shares or debentures of a company incorporated or to be incorporated outside Great Britain is unlawful unless:

- (a) before the issue, a copy certified by the chairman and two other directors as having been approved by resolution of the managing body is filed for registration; and
- (b) the prospectus is dated and states on its face that a copy has been filed (S. 354 (1)).

But no such copy need be filed where the offer is made only to existing members or debenture holders, or to a person whose ordinary business it is to buy or sell shares or debentures (S. 354 (2), (4)).

The prospectus must contain all the particulars prescribed by the Fourth Schedule of the Act, together with particulars of:—

- (a) the objects of the company;
- (b) the instrument constituting or defining the constitution of the company;
- (c) the enactments, or provisions having the force of an enactment, by or under which the incorporation of the company was effected;
- (d) an address in Great Britain where the said instrument, enactments or provisions, or copies thereof, and if the

same are in a foreign language, a translation thereof certified in the prescribed manner, can be inspected;

- (e) the date on which and the country in which the company was incorporated;
- (f) whether the company has established a place of business in Great Britain, and, if so, the address of its principal office in Great Britain;
- (g) the number of founders or management or deferred shares, if any;
- (h) the nature and extent of the interest of the holders of any founders or management or deferred shares in the property and profits of the company (S. 355 (1)).

Where, however, the prospectus is published as a NEWS-PAPER ADVERTISEMENT, a STATEMENT OF the company's PRIMARY OBJECT will suffice, and where the prospectus is issued more than two years after the date on which the company is entitled to commence business, items (a) to (d) above may be omitted.

## ABSTRACT OF CHAPTER VI

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### MEMBERS AND SHARES

- § 1.—WHAT CONSTITUTES MEMBERSHIP.
- § 2.—THE REGISTER OF MEMBERS.
- § 3.—DOMINION REGISTERS.
- § 4.—RECTIFICATION OF THE REGISTER.
- § 5.—EFFECT OF REGISTRATION.
- § 6.—TRUSTEES AS SHAREHOLDERS.
- § 7.—JOINT SHAREHOLDERS.
- § 8.—THE ANNUAL RETURN.
- § 9.—THE NATURE OF SHARES.
- § 10.—PREFERENCE SHARES.
- § 11.—ORDINARY SHARES.
- § 12.—DEFERRED SHARES.
- § 13.—APPLICATION FOR AND ALLOTMENT OF SHARES.
- § 14.—EFFECT OF IRREGULAR ALLOTMENTS.
- § 15.—RETURN AS TO ALLOTMENTS.
- § 16.—SHARE CERTIFICATES.
- § 17.—COMMISSIONS ON SHARES.
- § 18.—WHEN SHARES MAY BE ISSUED AT A DISCOUNT.
- § 19.—TRANSFER OF SHARES.
- § 20.—CERTIFICATION OF TRANSFERS.
- § 21.—EFFECT OF FORGED TRANSFERS.
- § 22.—TRANSMISSION OF SHARES.
- § 23.—SHARE WARRANTS TO BEARER FOR FULLY-PAID SHARES.
- § 24.—CALLS ON SHARES.
- § 25.—ENFORCEMENT OF CALLS—FORFEITURE.
- § 26.—RIGHT OF LIEN OVER SHARES.
- § 27.—MORTGAGES OF SHARES.
- § 28.—DIVIDENDS ON SHARES.
- § 29.—INTEREST ON SHARES ISSUED FOR CONSTRUCTION PURPOSES.



## CHAPTER VI

# MEMBERS AND SHARES

### § 1.—What Constitutes Membership.

In general, no person can become a member of a company until his name has been placed upon the register of members, after he has agreed to become a member (S. 25 (2)). Such an agreement may result from:—

- (a) an APPLICATION for an allotment of shares; or
- (b) the presentation of a TRANSFER from an existing member.

An agreement to become a member does not of itself render a person liable in respect of the shares which he has agreed to take, but the Court may enforce such an agreement by ordering his name to be placed upon the register (*Winstone's Case* [1879] 12 Ch. D. 239).

To the rule that a person cannot become a member of a company except by registration of his name there are, however, two exceptions, for the subscribers to the Memorandum are deemed to have agreed to become members, are bound to take at least one share each, and are liable as members whether or not their names are entered on the register (*Tyddyn Sheffrey Slate Quarries Co.* [1869] 20 L.T. 105); and by S. 140 a director who has signed and delivered to the Registrar a written undertaking to take and pay for his qualification shares, shall be in the same position as if he had signed the Memorandum for that number of shares. But if all the shares are allotted, leaving none for the subscribers, their liability is extinguished (*Tuffnell's Case* [1883] 29 Ch. D. 421), even if shares become available subsequently (*Mackley's Case* [1876] 1 Ch. D. 247). A subscriber is bound to pay for his shares in cash, and must take them by allotment and not by transfer.

Subject to the provisions of the Memorandum and Articles, any person capable of contracting may become a member of a company, but this rule is subject to the following qualifications:

- (1) A company cannot acquire its own shares.

**Addison's Case** [1870] 5 Ch. Ap. 294. In consideration of a loan, a company allotted to A, 500 shares of the same face value as the sum advanced. On the repayment of the loan, A transferred the shares to a nominee appointed by the company. HELD, that A remained liable in respect of the shares, as the company could not accept a transfer thereof.

(2) An infant member may avoid liability in respect of calls either before, or within a reasonable time after, attaining twenty-one years of age.

But if the infant accepts any benefit from his holding *after* attaining full age, he cannot subsequently repudiate, and in any case he cannot recover what he has paid for the shares unless there has been a total failure of consideration (*Steinberg v. Scala (Leeds) Ltd.* [1923] 2 Ch. 452). If the shares are worthless, a failure of consideration may be alleged (*Hamilton v. Vaughan Sherrin Engineering Co.* [1894] 3 Ch. 589).

A company may refuse to accept a transfer of shares to an infant (*Symon's Case* [1870] 5 Ch. 298); and may restore a transferor to the register on discovering that the transferee is an infant (*Capper's Case* [1868] 3 Ch. 458), unless in the meantime a transfer by the infant has been accepted (*Gooch's Case* [1872] 8 Ch. 266).

(3) The Articles may, and frequently do, authorise a company to refuse to accept a transfer to a married woman; but this restriction was formerly included because of the limitations existing on the contractual obligations of married women prior to the Law Reform (Married Women and Tortfeasors) Act, 1935, and since the passing of that Act the desirability of the restriction has disappeared.

A person may cease to be a member of a company by transmission of shares on death or bankruptcy of the member where the representative of the estate (the personal representative or the trustee) obtains, as he is entitled to do, a registration of the shares in his own name, by the dissolution of the company, or by the removal of his name from the register following a transfer or forfeiture of his shares, or the issue of a share warrant to bearer, or by redemption of Redeemable Preference Shares.

## § 2.—The Register of Members.

Every company must keep, in one or more books, a Register of its Members, and enter therein the following particulars:—

- (a) the *names* and *addresses*, and the *occupations*, if any, of the members, and in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its *number*, and of the *amount paid* or agreed to be considered as paid on the shares of each member;

- (b) the date at which each person was *entered* in the Register as a member;
- (c) the date at which any person *ceased* to be a member (S. 95 (1)).

Where the company has converted any of its shares into stock and given notice of the conversion to the Registrar of Companies, the Register must show the amount of stock held by each member, instead of the number of shares and the particulars relating to shares specified in paragraph (a) (*ibid.*).

Every company having more than 50 members must, unless the Register of Members is in such a form as to constitute in itself an index, keep an INDEX of the names of the members of the company, and must, within fourteen days after the date on which any alteration is made in the Register of Members, make any necessary alteration in the Index (S. 96 (1)).

The Index, which may be in the form of a card index, must in respect of each member contain a sufficient indication to enable the account of that member in the Register to be readily found (S. 96 (2)).

If default is made in complying with these Sections, the company, and every officer of the company who is in default, will be liable to a fine of £5.

The *Register of Members*, commencing from the date of the registration of the company, and the Index of the names of members, must be *kept at the Registered Office* of the company, and, except when the Register is closed under the provisions of the Act, shall during business hours (subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge, and of any other person on payment of one shilling or such less sum as the company may prescribe, for each inspection (S. 98 (1)).

In addition, any member or other person may require a copy of the Register, or of any part thereof, on payment of sixpence, or such less sum as the company may prescribe, for every 100 words or fractional part thereof required to be copied, and the company must cause any copy so required by any person to be sent to that person within a period of 10 days commencing on the day next after the day on which the requirement is received by the company (S. 98 (2)).



If any inspection required under this Section is refused, or if any copy required under this Section is not sent within the proper period, the company will be liable in respect of each offence to a fine not exceeding £2, and to a further fine not exceeding £2 for every day during which the refusal or default continues, and every director, manager, secretary or other officer of the company who knowingly and wilfully authorises or permits the refusal or default will be liable to the like penalty (S. 98 (3)).

In the case of any such refusal or default, the Court may by order compel an immediate inspection of the Register and Index, or direct that the copies required shall be sent to the persons requiring them (S. 98 (4)).

On giving notice by advertisement in some newspaper circulating in the district in which the Registered Office of the company is situate, the Register of Members may be closed for any time or times not exceeding in the whole 30 days in each year (S. 99).

### § 3.—Dominion Registers.

A company having a share capital whose objects comprise the transaction of business in any part of His Majesty's Dominions outside Great Britain, the Channel Islands, or the Isle of Man, may cause to be kept in any such part of His Majesty's Dominions in which it transacts business a Dominion Register, i.e. a BRANCH REGISTER OF MEMBERS resident in that part (S. 103 (1)).

The company must give to the Registrar of Companies notice of the situation of the office where any Dominion Register is kept and of any change in its situation, and if it is discontinued, of its discontinuance, within fourteen days after the opening of the office or of the change or discontinuance as the case may be (S. 103 (2)).

A Dominion Register, which is deemed to be part of the company's Register of Members, must be kept in the same manner in which the principal Register is required to be kept, except that the advertisement before closing the Register must be inserted in some newspaper circulating in the district where the Dominion Register is kept, and that any competent Court in that part of His Majesty's Dominions where the Register is kept may exercise the jurisdiction of rectifying the

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Register, and that the offences of refusing inspection or copies of a Dominion Register, and of authorising or permitting the refusal, may be prosecuted summarily before any tribunal having summary criminal jurisdiction in that part of His Majesty's Dominions (S. 104).

The company must transmit to its Registered Office a copy of every entry in its Dominion Register as soon as may be after the entry is made, and must cause to be kept at its REGISTERED OFFICE, duly entered up from time to time, A DUPLICATE OF ITS DOMINION REGISTER (S. 104 (3)).

A company may discontinue to keep a Dominion Register, and thereupon all entries in that Register must be transferred to some other Dominion Register kept by the company in the same part of His Majesty's Dominions, or to the principal Register (S. 104 (5)).

Subject to the provisions of the Act, any company may, by its Articles, make such provisions as it may think fit respecting the keeping of Dominion Registers (S. 104 (6)).

#### § 4.—Rectification of the Register.

The Court has power to order a rectification of the Register of Members upon application of the company, a member of the company or the person aggrieved where:

- (a) the name of any person is, without sufficient cause, entered in or omitted from the Register; or
- (b) default is made or unnecessary delay takes place in entering on the Register the fact of any person having ceased to be a member (S. 100 (1)).

On an application under this Section, the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the Register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the Register (S. 100 (3)).

In addition, the Court may order the company to pay damages to the person aggrieved and may direct notice of the rectification to be given to the Registrar of Companies (S. 100 (4)).

### § 5.—Effect of Registration.

The Register is *prima facie* evidence that persons named therein are members of the company, but it is not conclusive evidence, so that a person named therein who has never agreed to become a member cannot be held liable as a member (*Ormerod's Case* [1894] 2 Ch. 475); and a person whose name has been wrongfully removed is entitled to have his name restored.

But the presence of a name upon the Register entitles the company to regard that person as the legal holder of the shares standing in his name, and the company is not bound to take notice of the equitable interests of persons other than the registered holder of the shares.

**Simpson v. Molson's Bank** [1895] A.C. 270. X, by his will, left shares in the Y company to certain trustees on trust for Z. The trustees were registered as members. Subsequently, these trustees unlawfully transferred the shares to A. The company was aware that Z had an equitable interest in the shares, but it did not refuse the transfer. HELD, that the company was under no liability to Z, as it was not concerned with equitable interests to which its shares were subject.

Indeed, the Companies Act, 1929, goes further and provides that "no notice of any trust, express, implied or constructive, shall be entered on the Register" (S. 101).

But this rule does not enable a company to obtain an advantage for itself, by ignoring the existence of equitable interests of which it has notice.

**Bradford Banking Co. v. Briggs & Co.** [1886] 12 A.C. 29. The Articles of the company gave it a first and paramount lien over the shares of its members, in respect of all debts due to the company from the said members. A member mortgaged his shares to a Bank, which gave notice of its charge to the company. Subsequently, the member incurred a liability to the company, which claimed the shares under its right of lien. HELD, that as the company had notice of the Bank's charge before its right of lien had attached, the Bank was entitled to priority as against the company.

Similarly, where a company advances money upon the security of its own shares, its charge will be postponed to prior equitable interests of which it has notice at the date of the advance (*Mackereth v. Wigan Coal Co.* [1916] 2 Ch. 293).

The rule that a company is not bound to take notice of a trust means nothing more than this: it is not bound to warn

persons with equitable interests that the registered holder of shares is about to imperil their interests, e.g. by transferring the shares, and it is entitled to look to the registered holder as the person who is liable in respect of the shares. Thus, if a call is made, the registered holder is personally liable, even if the company is aware that he is only a trustee of the shares which are registered in his name, although, where shares are registered in the name of a nominee, the beneficial owner can be compelled to indemnify the nominee if he is called upon to pay.

Persons with equitable interests in shares cannot protect themselves against the fraudulent acts of the legal owner of the shares by merely giving notice of their interests to the company. They may, however, safeguard themselves against the fraudulent transfer of the shares by serving a "stop order" or "notice in lieu of distringas" on the company; where such an order or notice has been served, the company must give notice to the persons who served it of any intended transfer of the shares therein described, and must refuse to register the transfer of the shares until the lapse of eight days.

Thus, persons with equitable interests in shares give simple notice of their interests to the company merely for the purpose of protecting the priority of their interests as against any equitable interests which the company may create for itself subsequent to the receipt of such notice.

A person cannot escape liability as a member by taking shares under an assumed name (*Klondyke Gold Co.* [1899] W.N. 1).

#### § 6.—Trustees as Shareholders.

Where shares are the subject of a trust, the trustee must be registered as a member, and no notice of the equitable interests of persons not on the Register can be received by the company (*ante* § 5). In such a case, the trustee, being registered, may exercise all the rights of a legal owner of shares, including the right to concur in any scheme for:—

- (a) the reconstruction of the company;
- (b) the sale of the undertaking to another company;
- (c) the amalgamation of the company with another company;

- (d) the release, modification or variation of any rights, privileges or liabilities attached to the shares (S. 10 (3), Trustee Act, 1925).

Upon the death of one of a number of co-trustees, the title in the shares passes to the survivors, but on the death of a sole trustee, it passes to his personal representatives until new trustees are appointed. Upon the appointment of new trustees, however, the shares cannot be transferred to them except by virtue of a transfer instrument executed by the person in whom the shares are vested at the time, a vesting declaration being ineffective for this purpose (S. 40 (4), Trustee Act, 1925). Similarly, upon the retirement of a trustee, a transfer is necessary in order to vest the shares in the continuing trustees (*ibid.*). But in special circumstances, the Court may make an order vesting the right to transfer shares (or to receive dividends) in some person other than the person entitled to make the transfer, and, after notice in writing of such an order has been given to the company, the company must not register a transfer or pay dividends except in accordance with the order (S. 51, Trustee Act, 1925).

### § 7.—Joint Shareholders.

Where shares are held by two or more persons jointly, the rights of the shareholders will depend very largely upon the Articles. Thus, Clause 55 of Table A provides that the holder whose name stands first upon the register is entitled to vote in respect of the shares, while Clause 94 provides that any one of the persons who are registered as joint holders of the shares may give effectual receipts for dividends, and Clause 12 makes joint holders liable jointly and severally for calls.

As the order in which the names of the holders appear upon the register may affect the voting rights of the holders, it is worth observing that in *Burns v. Siemens Bros. Dynamo Works* [1919] 1 Ch. 225, it was held that joint holders are entitled to require the company to register some of the shares with the name of one holder first and others with the name of the other holder first.

Under Table A, the right of lien for debts other than calls does not extend to shares registered in the names of joint holders [*post* § 26].

**§ 8.—The Annual Return.**

EVERY COMPANY HAVING A SHARE CAPITAL must once at least in every year make a Return containing a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last Return or, in the case of the first Return, of the incorporation of the company (S. 108 (1)).

The list must state the *names, addresses, and occupations* of all the past and present members therein mentioned, and the *number of shares* held by each of the existing members at the date of the return, specifying *shares transferred* since the date of the last Return, or in the case of the first Return, of the incorporation of the company, by persons who are still members and have ceased to be members respectively, and the dates of registration of the transfers, and if the names therein are not arranged in alphabetical order, must have annexed to it an INDEX sufficient to enable the name of any person in the list to be readily found.

Moreover, where the company has converted any of its shares into stock and given notice of the conversion to the Registrar of Companies, the list must state the amount of stock held by each of the existing members instead of the amount of shares and the particulars relating to shares.

The Return must also state the address of the Registered Office of the company, and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

- (a) the amount of the share *capital of the company*, and the *number of the shares* into which it is divided;
- (b) the *number of shares taken* from the commencement of the company up to the date of the return;
- (c) the *amount called up* on each share;
- (d) the total *amount of calls received*;
- (e) the total *amount of calls unpaid*;
- (f) the total amount of the sums, if any, paid by way of *commission* in respect of any shares or debentures;

- (g) particulars of the *discount* allowed on the issue of any shares issued at a discount, or of so much of that discount as has not been written off at the date on which the return is made;
- (h) the total amount of the sums, if any, allowed by way of *discount* in respect of any *debentures*, since the date of the last return;
- (i) the total number of *shares forfeited*;
- (k) the total amount of shares for which *share warrants* are *outstanding* at the date of the return;
- (l) the total amount of *share warrants issued and surrendered* respectively since the date of the last return;
- (m) the number of *shares comprised in each share warrant*;
- (n) all such particulars with respect to the persons who at the date of the return are the *directors* of the company as are by this Act required to be contained with respect to directors in the register of the directors of a company;
- (o) the total amount of the *indebtedness of the company* in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies under this Act, or which would have been required so to be registered if created after the 1st July, 1908 (S. 108 (3)).

The Return must be in the form reproduced in Appendix V at the end of this book.

In the case of a company which keeps a Dominion Register, particulars of the entries in that Register must be included in the Annual Return (S. 108 (5)).

The Annual Return must be contained in a separate part of the Register of Members, and must be completed within 28 days after the first or only general meeting in the year, and the company must forthwith forward to the Registrar of Companies a copy signed by a director or by the manager or by the secretary of the company (S. 110 (1)).

S. 98 of the Act (see §2 *supra*) with reference to rights of inspection and obtaining copies applies to the Annual Return as it applies to the Register of Members.

Except in the case of private companies and assurance companies, the Return must include a written copy, certified by a director or manager or secretary of the company to be a true copy, of the last Balance Sheet, which has been audited by the company's Auditors, including every document required by law to be annexed thereto, together with a copy of the Auditors' Report, and where the Balance Sheet is in a foreign language, a certified translation thereof (S. 110 (3)).

Moreover, if the last Balance Sheet did not comply with the requirements of the law in force at the date of the audit, the copy to be registered must be amended to comply with the law, but the fact that it has been so amended must be stated thereon (*ibid.*).

A COMPANY WITHOUT A SHARE CAPITAL must once at least in every calendar year make a Return stating:—

- (a) the address of the Registered Office;
- (b) all such particulars with respect to the directors as are required to be inserted in the Register of Directors.

To this Return must be annexed a statement containing particulars of the total amount of the company's indebtedness in respect of all mortgages and charges which are required to be registered with the Registrar of Companies (S. 109 (1)).

### § 9.—The Nature of Shares.

A share in a company is a proportional equity and interest. It may be defined as "The interest of a shareholder, measured by a sum of money, for the purpose of liability in the first place and of interest in the second."

Thus, if the capital of a company be divided into shares of a nominal value of £10, each holder of a share agrees to contribute, in respect of such share, not more than such nominal value of £10, towards the assets of the company.

The shareholders are the proprietors of the company, and have the right to share among themselves, according to the amount of their respective interests, such part of the profits of the company as is formally resolved to be divided. Further, on a winding-up of the company's affairs, the shareholders are entitled to receive each his due proportion of the assets of the company remaining after the payment of expenses and of the company's liabilities.



Hence, a share is both a measure of a liability and of interest in the undertaking.

Each share must be distinguished from every other share by an appropriate number, so that it is possible to identify the extent of every shareholder's interest and liability (S. 62 (2)).

The number of shares which a company may issue, and the extent of the interests and liabilities enjoyed and incurred by the holders thereof, is defined by the Memorandum and Articles, which frequently authorise the issue of shares of different classes, each class enjoying different privileges. The three principal classes are (1) preference shares, (2) ordinary shares, and (3) deferred shares

### § 10.—Preference Shares.

Preference shares are entitled to priority over other shares as to dividends, and as to capital also in many cases. Thus, any "5% Preference Shares" would be entitled to receive a fixed dividend at the rate of 5% per annum before any profits are available for the "Ordinary Shares," but unless the Articles otherwise provide, the stated per cent. of dividend is also the maximum part of the profits to which the preference shares are entitled (*Will v. United Lankat Co.* [1914] A.C. 11).

In the absence of any contrary provision in the Articles, all preference shares are presumed to be CUMULATIVE AS TO DIVIDENDS, i.e. if in any year the profits of the company are not sufficient for the payment of the dividends on the preference shares at the full rate, the deficiency must be made good in subsequent years before anything is available for the ordinary shares. But the *Articles* may provide that the shares shall be *non-cumulative*.

Usually, when a company is wound up, the holders of preference shares participate in the distribution of surplus assets *pari passu* with the holders of ordinary shares, but if the shares are preferential as to capital, the holders are entitled to receive the amounts paid up upon their shares before any payment is made to the ordinary shareholders, and, if necessary, the liquidator must make a call upon the ordinary shares in order to obtain the wherewithal to repay the capital subscribed by the holders of the preference shares (*Hodge's Distillery Co.* [1871] 6 Ch. 51). But unless the Articles so provide, on a winding-up, the holders of cumulative preference shares are

not entitled to have arrears of dividend undeclared made good out of the surplus assets (*Crichton's Oil Co.* [1902] 2 Ch. 86). [This subject is dealt with in greater detail in Chapter XVII.]

If so permitted by its Articles, a company may issue REDEEMABLE PREFERENCE SHARES, but the power is subject to the following restrictions:—

- (1) The shares cannot be redeemed except out of:—
  - (a) profits which would be available for dividends; or
  - (b) the proceeds of a fresh issue of shares made for the purposes of the redemption.
- (2) At the date of the redemption the shares must be fully paid (S. 46 (1)).

Where the redemption is made out of profits available for dividends, the company must transfer to a "Capital Redemption Reserve Fund," out of such profits, a sum equal to the amount applied in effecting the redemption. For the purposes of a capital reduction, this fund is to be treated as if it formed part of the company's paid-up capital; consequently, it cannot be reduced save in accordance with the rules of the Act relating to reduction of capital, except that where new shares are issued in place of those redeemed, the capital redemption reserve fund may be used, up to the nominal amount of the new shares, in paying up unissued shares of the company to be issued to members as fully paid bonus shares (S. 46 (5)).

A company which has redeemed or is about to redeem any preference shares has power to issue new shares up to the nominal amount of the shares redeemed, and such an issue will not be regarded as an increase of capital for the purposes of stamp duty, unless:—

- (a) the issue is made *before* the contemplated redemption; and
- (b) the redemption does not take place within one month after the issue (S. 46 (4)).

Where any shares are redeemed out of the proceeds of a fresh issue, and a premium is payable on redemption, the premium must have been provided for out of profits before the shares are redeemed (S. 46 (1)).

Particulars of all redeemable preference shares must be included in every balance sheet, specifying:—

- (a) what part of the issued capital consists of such shares; and
- (b) the date on or before which the shares are liable to be redeemed (S. 46 (2)).

If a company fails to comply with the provisions of S. 46 (1), the company and every officer in default is liable to a fine not exceeding £100.

Notice of the redemption of preference shares must be given to the Registrar within one month of the redemption (S. 51 (1)).

### § 11.—Ordinary Shares.

A large portion of a company's capital is usually divided into ordinary shares, which carry the right to receive the bulk of the profits available for dividends after the fixed dividend on the preference shares has been paid, but occasionally preference shares are given the right to participate with the ordinary shares in these profits.

### § 12.—Deferred Shares.

These are shares, often of a small nominal value, e.g. 1s. 0d., which are sometimes issued to promoters in consideration of their services, and which carry the right to receive a specified proportion (or possibly the whole residue) of the profits after a dividend at a certain rate has been paid to the holders of the ordinary shares; it follows that they are frequently very valuable.

### § 13.—Application for and Allotment of Shares.

A prospectus invites the public to apply for shares in a company, and the application which is made in response to the invitation is an offer to take shares in the company. This offer may or may not be accepted by the company, and no contract is made until it has been accepted. Moreover, the offer may be withdrawn at any time before it is accepted, provided that notice of the revocation is communicated to the company before a letter of acceptance has been posted by it (*Household Fire Insurance Co. v. Grant* [1878] 4 Ex. D.216).

Similarly, under the general rule of contract law, the offer will lapse if it is not accepted within a reasonable time (*Ramsgate Victoria Hotel Co. v. Montefiore* [1866] L.R. 1 Ex. 109); and where an application is made for a certain number of shares, the applicant is not bound to take a smaller number unless the form of application provides that he is willing to do so, for the acceptance of the offer must be absolute (*re Barber* [1852] 15 Jur. 51).

The acceptance of the offer usually takes the form of a letter of allotment, informing the applicant that a specified number of shares has been allotted to him in accordance with his application, and this constitutes a contract between the applicant and the company.

No allotment of shares can be made by a company which makes a public offer unless:—

- (i) there has been subscribed the amount stated in the prospectus as the minimum amount which in the opinion of the directors *must be raised by the issue* in order to provide for:—
  - (a) the purchase price of property which is to be defrayed out of the proceeds of the issue;
  - (b) any preliminary expenses payable by the company and any commission payable to any person for agreeing to subscribe or procure subscriptions for shares;
  - (c) the repayment of moneys borrowed by the company in respect of the foregoing matters;
  - (d) working capital; and
- (ii) the sum payable on application has been paid to and received by the company (S. 39 (1)).

The amount which is payable on application, which must not be less than 5 per cent. of the nominal value of the shares, is fixed by the Articles, and this must be received by the company in cash before an allotment can be made; but where the payment is made by cheque, the receipt of the cheque is sufficient, provided that the directors have no reason to suspect that the cheque will not be met (*ibid.*). Shares to be allotted for a consideration *other* than cash *cannot* be included in the “minimum subscription.”

If the above conditions have not been complied with on the expiration of 40 days after the first issue of the prospectus, all money received from applicants for shares must be repaid forthwith to them without interest, and, if any such money is not so repaid within 48 days after the issue of the prospectus, the directors of the company will be jointly and severally liable to repay the money with interest at the rate of 5% per annum from the expiration of the 48th day, unless they are able to prove that the default in the repayment of the money was not due to any misconduct or negligence on their part (S. 39 (4)).

Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section is void (S. 39 (5)).

The above provisions do not apply, however, to an allotment subsequent to the first allotment of shares offered to the public, except that which requires not less than 5 per cent. of the nominal value of the shares to be paid on application (S. 39 (6)).

By S. 40, any company, other than a private company, having a share capital, which does not issue a prospectus with reference to its formation or which has issued such a prospectus but has not allotted any shares thereon, shall not allot any shares or debentures unless at least three days before the first allotment thereof, a statement in lieu of prospectus has been filed with the Registrar for registration, signed by every person named therein as a director or proposed director of the company or by his agent authorised in writing.

#### § 14.—Effect of Irregular Allotments.

If an allotment is made before the conditions of Ss. 39 and 40 have been satisfied, the following consequences may ensue:—

- (1) The allotment may be avoided by the allottee, provided that the right to avoid is exercised within one month after:—

- (a) the holding of the statutory meeting; or

- (b) the date of the allotment, where

- (i) there is no statutory meeting; or

- (ii) the allotment is made after the statutory meeting (S. 41 (1)).

The right to avoid may be exercised notwithstanding that the company is in the course of being wound up (*ibid.*).

- (2) Damages may be recovered from any director who knowingly permits a contravention of the requirements of Ss. 39 and 40 (S. 41 (2)). But any action for damages must be commenced within two years after the date of the allotment (*ibid.*).

### § 15.—Return as to Allotments.

Whenever a company makes any allotment of its shares, it must within one month thereafter file with the Registrar of Companies:—

- (a) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses, and descriptions of the allottees, and the amount, if any, paid or due and payable on each share; *and*
- (b) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted (S. 42 (1)).

Where such a contract is not reduced to writing, the company must, within one month of the allotment, file with the Registrar of Companies the prescribed particulars of the contract, stamped with the same stamp duty as would have been payable if the contract had been reduced to writing (S. 42 (2)).

If default is made in complying with this section, every director, manager, secretary, or other officer of the company, who is knowingly a party to the default, will be liable to a fine not exceeding £50 for every day during which the default continues, but the Court may give relief by extending the time for registration (S. 42 (3)).

### § 16.—Share Certificates.

Within two months after an allotment or transfer, the company must, unless the conditions of issue otherwise provide, have share certificates ready for delivery to the allottees or transferees, certifying that they are the holders of the shares specified therein.

These certificates, under the common seal of the company, are *prima facie* evidence that the persons named therein are entitled to the shares specified (S. 68). Thus, a prospective purchaser of shares is entitled to assume that the person named in the certificate is the true owner of the shares covered thereby, and the company will be liable to indemnify him if the person named has not, in fact, a title.

**Re Bahia Railway Co.** [1868] 3 Q.B. 584. By means of a forged transfer, X obtained from a company a share certificate naming him as the holder of certain shares. On the faith of this certificate, Y purchased the shares from X. The true owner obtained rectification of the register. HELD, that the company must indemnify Y for the loss he had suffered on account of the wrongful issue of the certificate to X.

But the company is not liable where the certificate is issued irregularly (*Ruben v. Great Fingall Consolidated* [ante, Ch. IV, § 12] ); or where the purchaser does not rely upon the certificate (*Vulcan Ironworks Co.* [1885] W.N. 120).

It will be observed then, that by issuing a certificate, the company warrants to the public at large that the person named therein is the legal owner of the shares, but it does not warrant that the named person's title is free from equitable interests.

**Peat v. Clayton** [1906] 1 Ch. 659. X, who was the registered holder of shares, assigned the whole of his assets to trustees for the benefit of his creditors, but retained his share certificate. The trustees gave notice of the assignment to the company. Later, X transferred the shares to P, who took them on the faith of the certificate. HELD, that as *the trustees* had given notice of their equitable interest to the company, they were entitled to the shares in priority to P, who had no right of action against the company.

It is to be noted that this decision does not conflict with that in *Simpson v. Molson's Bank* (*supra*, § 5), since here *the trustees* gave notice to the company. Thus, the company would have knowledge that there was a trust in relation to such shares, and would consequently be entitled to reject a transfer of the shares unless such transfer was signed or authorised by the

trustees, since they would know that the transfer would cause a breach of trust.

On the same principle, the company is estopped from denying, as against a person who purchases in good faith, and in reliance on the certificate, that the shares have been paid up to the extent specified in a certificate.

**Bloomenthal v. Ford** [1897] A.C. 162. X lent £1,000 to a company on terms that he was to receive 10,000 fully paid shares as security. The company issued a certificate stating that X was the holder of the necessary number of shares which were described as fully paid. In fact nothing had been paid upon the shares. HELD, that the company and its liquidator were estopped from denying the truth of the statements made in the certificate.

But if the person named in the certificate has notice that the shares are not paid up to the extent specified therein, no case of estoppel will arise (*African Gold Co.* [1899] 1 Ch. 414).

It is usually stated in the certificate that no transfer of the shares will be registered unless the certificate is deposited with the company, but the company is not liable to a person who suffers loss through its failure to insist upon the deposit (*Guy v. Waterlow Bros.* [1908] 25 T.L.R. 515).

As a result of these cases, it has, therefore, been established that, as against the company by which it is issued, a share certificate creates (a) an estoppel as to the *title* of the person named therein, and (b) an estoppel as to the *payment* alleged to have been made in respect of the shares. Consequently, if any person in good faith relies upon the certificate and suffers a loss in consequence, the company is estopped from denying that the statements in the certificate are true.

### § 17.—Commissions on Shares.

A company may pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company provided that:—

- (a) the payment of the commission is authorised by the Articles; *and*
- (b) the commission paid or agreed to be paid does not exceed ten per cent. of the price at which the shares are issued, or the amount or rate authorised by the Articles, whichever is the less; *and*



- (c) the amount or rate per cent. of the commission paid or agreed to be paid is:—
  - (i) in the case of shares offered to the public for subscription, disclosed in the prospectus; *or*
  - (ii) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed before the payment of the commission with the registrar of companies, and, where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, also disclosed in that circular or notice; *and*
- (d) the number of shares which persons have agreed for a commission to subscribe absolutely is disclosed in manner aforesaid (S. 43 (1)).

Except in accordance with the above provisions, a company must not apply any of its shares or capital money in payment of any commission or allowance for taking or placing shares (S. 43 (2)). Payment of brokerage to a broker in consideration of his placing shares is, however, permitted (S. 43 (3)).

Where shares are to be offered for subscription to the public, it is customary to insure against the possibility that the issue may be under-subscribed, and in such circumstances sundry persons known as “underwriters” agree, in consideration of a commission representing a percentage of the nominal value of the issue, to take up a specified proportion of the shares which are not subscribed for by the public. This underwriting commission cannot, however, be paid except in accordance with the provisions of S. 43 quoted above.

It should, moreover, be observed that the Act permits the payment of underwriting commission by companies, public or private, which do *not* offer shares for subscription to the public; but, in such cases, the statement in lieu of prospectus, or the statement in the prescribed form disclosing the rate of commission, must be filed before the *payment* of the commission.

An agreement whereby an underwriter is given the option of subscribing for further shares at par is not a payment of commission within the meaning of the section (*Hilder v. Dexter* [1902] A.C. 474). But sums received by way of premium

may not be used to pay a commission, except in accordance with the provisions of the Act (*Shorto v. Colwill* [1909] 101 L.T. 598).

Where a company has paid any sums by way of commission in respect of any shares or debentures, or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed, or so much thereof as has not been written off, must be stated in every balance sheet of the company until the whole amount thereof has been written off (S. 44 (1)).

It is unlawful for a company to give, whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with, a purchase of any of its shares. But this rule is subject to qualifications, for it does not prohibit:—

- (a) the lending of money by the company in the ordinary course of its business, where the lending of money is part of the ordinary business of a company;
- (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase by trustees of fully-paid shares in the company, to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company;
- (c) the making by a company of loans to persons, other than directors, *bona fide* in the employment of the company, with a view to enabling those persons to purchase fully-paid shares in the company, to be held by themselves by way of beneficial ownership (S. 45 (1)).

But the aggregate amount of any outstanding loans made under the authority of provisos (b) and (c) must be shown as a separate item in every Balance Sheet of the company (S. 45 (2)).

### § 18.—When Shares may be issued at a Discount.

As a general rule, it is unlawful to issue shares at a discount, as to do so would involve a reduction of the company's capital (*Ooregum Gold Mining Co. v. Roper* [1892] A.C. 125). But this rule is subject to the following qualifications:—

- (1) Commission may be paid in consideration of an agreement to take shares [*ante*, § 17].

- (2) If new shares of a class already issued are to be issued, a discount may be allowed provided that:—
- (a) the issue of the shares at a discount must be authorised by resolution passed in general meeting of the company, and must be sanctioned by the Court;
  - (b) the resolution must specify the maximum rate of discount at which the shares are to be issued;
  - (c) not less than one year must, at the date of the issue, have elapsed since the date on which the company was entitled to commence business;
  - (d) the shares to be issued at a discount must be issued within one month after the date on which the issue is sanctioned by the Court, or within such extended time as the Court may allow (S. 47 (1)).

In such a case, every prospectus relating to the issue of the shares, and every balance sheet subsequently issued by the company, must contain particulars of the discount allowed or of so much thereof as has not been written off to date (S. 47 (3)).

The rule prohibiting the issue of shares at a discount except under S. 47, does not extend to an issue of debentures, but where debentures were issued at a discount on terms that the holders should at any time have the right to convert the debentures into shares of the same nominal value, the arrangement was held to be *ultra vires* and void (*Moseley v. Koffyfontein Mines* [1904] 2 Ch. 108).

### § 19.—Transfer of Shares.

Shares in a company are, with one or two unimportant exceptions, personal property, and are transferable in accordance with the provisions of the Articles (S. 62 (1)). But, notwithstanding anything to the contrary in the Articles, it is unlawful for the company to register a transfer, except on deposit of a proper instrument of transfer (S. 63). Every transfer must, therefore, be in writing, but the form may vary in accordance with the Articles, and these frequently require the transfer to be by deed. The transfer must be stamped in accordance with the laws in force for the time being.

*Prima facie*, a shareholder has a right to transfer his shares to whomsoever he desires, even to a "man of straw"; but this unlimited right is usually restricted by the Articles giving the directors a power, as in Clause 19 of Table A, to refuse transfers in certain cases and in certain circumstances. S. 26 provides that the right of transfer of shares in a private company *must* be restricted by the Articles.

It is quite usual for the Articles to authorise directors to reject transfers of shares (i) to infants, since these may cause the company loss by avoiding their liability on the shares; (ii) to married women, although their liability is now personal and is not limited to their separate property, if any; and (iii) over which the company, by its Articles, has a right of lien. In addition, directors often have the right to reject transfers of shares to persons of whom they do not approve; but where this right is given to the directors the objection must be something personal to the proposed transferee, making it undesirable that such person in particular shall become a member. Thus, directors may, in exercise of this right, refuse to permit a transfer of shares (i) to an insolvent person, or one who cannot pay calls, or (ii) to a quarrelsome person; but the directors may not, in exercise of this right, reject transfers (i) to prevent a number of small holdings of shares, or (ii) to prevent an increase in the voting power of an existing shareholder who desires a greater interest in the company, since in these two cases the objection is not as to the person of the transferee.

Even where the Articles provide that the directors may refuse to register a transfer of shares where the proposed transferee is an undesirable person to be admitted as a member, the directors cannot refuse to register a transfer to a person who is already a shareholder and a member of the company (*Tangney v. Clarence Hotels Co.* [1933] Ir. R. 51).

The Court, if satisfied that the directors have *bona fide* exercised their right of rejection of transfers, will not compel them to disclose their reasons for rejection in any particular case. But even where the Articles authorise the directors to refuse a transfer, they cannot decline to register the executor of a deceased shareholder (*Bentham Mills Spinning Co.* [1879] 11 Ch.D. 900); or a person nominated to receive new shares where such shares are offered to members who are given a right of nomination (*Pool Shipping Co.* [1920] 1 Ch. 251).

Apart from this right of rejection vested in the directors, Articles may restrict the unfettered right of the shareholder by providing that shares must be transferred on the happening of certain events, e.g. death or bankruptcy; and they may further provide that certain persons or classes of persons shall have first option on shares being transferred; or, that shares must in certain events be offered for sale to certain classes of persons at a fixed or agreed price (*Phillips v. Manufacturers Securities Ltd.* [1917] 116 L.T. 290).

Notice of a refusal to transfer shares must be given to the transferee within two months after the date of the lodgment of the transfer (S. 66). And if the transfer is not refused, a new share certificate must be completed and ready for delivery to the transferee within the same period, unless the conditions of issue of the shares provide otherwise (S. 67 (1)).

On entering into a contract to transfer his shares, the transferor undertakes to execute a valid transfer and to assist the transferee in obtaining registration thereof; but it is the transferee's duty to apply for registration, and although the execution of the transfer gives the transferee an equitable interest in the shares, nothing short of registration can invest him with the legal title. But as the transferor remains liable in respect of the shares for so long as his name is upon the Register of Members, the Act allows the transferor to apply for registration of the transfer, if the transferee does not do so (S. 66). But where a transfer is made to a person who has no knowledge thereof, the transferor remains liable and his name may be restored to the Register (*Henessey's Executors* [1849] 2 Mac. & G. 201).

### § 20.—Certification of Transfers.

Where the whole of the shares which are evidenced by one certificate are to be transferred to the same person, the transferor, after executing the transfer instrument, hands it, together with the share certificate, to the transferee, who, after himself executing the instrument, presents it and the certificate for registration. But where only a portion of the holding is to be transferred, or there are two or more transferees, this procedure cannot be adopted, and in such cases, the transferor deposits the certificate with the company, which by an indorsement on the transfer instrument (or instruments as the case

may be), certifies that the necessary certificate has been deposited. Where, however, the registrar or secretary of a company fraudulently certifies a transfer, and the certificate is not in fact deposited with the company, the company is not liable to a person who relies upon the certification (*Kleinwort Sons & Co. v. Associated Automatic Machine Corporation* [1934] W.N. 65). The company does not by certifying a transfer warrant the title of the transferor (*Bishop v. Balkis Consolidated Co.* [1890] 25 Q.B.D. 520). But, if the certification states that the shares represented by the certificate deposited are fully paid, the company cannot hold the transferee liable for calls (*Concessions Trust* [1896] 2 Ch. 577).

Where less than the transferor's holding is to be transferred, he receives, on depositing his certificate with the company, a "Balance Ticket," which authorises him to apply for a new certificate in respect of that portion of his holding which he wishes to retain.

### § 21.—Effect of Forged Transfers.

If, in error, a company registers a transfer under an instrument upon which the signature of the registered holder has been forged, the holder is entitled to have his name restored to the register and the Court may, if necessary, order rectification. In such a case, the company must pay to the holder any dividends declared since the removal of his name from the register (*Barton v. North Staffordshire Railway Co.* [1888] 38 Ch. D. 211). But it can also recover calls from the holder (*Addison's Case* [1870] 5 Ch. App. 294 (*ante*, § 1)).

The company may recover from the transferee under the forged transfer any dividends or other membership benefits which he has received, but any resolutions on which the transferee had voted are not invalid by the mere fact that the transferee is subsequently removed from the register.

In order to protect itself against the risk of passing a forged transfer, it is usual for the company to notify members that transfers in their names have been lodged for registration, and that unless instructions to the contrary are received, the transfer will be registered; but although this method of procedure answers its purpose in the majority of cases, it does not render a forged transfer valid, even where the supposed transferor does not reply to the notice. It has already been observed

[*ante*, § 16] that, as the result of the registration of a forged transfer, a company may be called upon to pay damages to a third party who relies upon a share certificate which is wrongfully issued, and with a view to this peril, it is provided by the Forged Transfers Acts, 1891 and 1892, that a fee of not more than 1s. per £100 may be charged on every transfer, in order that a fund may be built up out of which damages may be paid. These Acts are not, however, usually adopted, nor do they in any way modify the company's liability.

## § 22.—Transmission of Shares.

Upon the death of a shareholder, his title to the shares passes by transmission to his personal representatives as part of his personal estate, and upon producing evidence of their title, i.e. probate or letters of administration, the personal representatives are entitled to deal with the shares. A clause in the Articles requiring the production of evidence of title *other* than probate or letters of administration is of no effect (S. 69).

The Articles may, however, provide that the directors shall have the right to insist that the personal representatives of a deceased shareholder shall either:—

- (a) be registered as members in respect of the shares; or
- (b) make such transfer of the shares as the deceased could have made.

The personal representatives do not become members of the company unless they apply to be put on the Register, and where no such application is made, they are not liable for calls beyond the extent of the assets of the deceased. A company may register a personal representative on receipt of a "letter of request," a written instrument of transfer being unnecessary even where the personal representative is beneficially entitled under the will (*Edwards v. Ransomes and Rapier Ltd.* [1930] 143 L.T. 594).

A transfer of shares made by a personal representative is valid, notwithstanding that the personal representative is *not* a member of the company (S. 64).

Upon the bankruptcy of a shareholder, his shares vest by transmission in his trustee in bankruptcy as at the date of the commencement of the bankruptcy, and, like a personal representative, the trustee *may*, if the Articles so provide, be required

either to be registered as a member (in which case he will become fully liable for calls), or to transfer the shares. But the trustee may exercise the rights of a member although his name is not upon the Register, and under the power which is given to him by the Bankruptcy Act, 1914, he may disclaim liability in respect of the shares, in which event the company will be left to prove in the bankruptcy for any damages it may suffer through the disclaimer.

### § 23.—Share Warrants to Bearer for Fully-Paid Shares.

A company limited by shares, if so authorised by its Articles, may, with respect to any fully paid-up shares, issue a warrant under its common seal, stating that the bearer is entitled to the shares therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares included in the warrant (S. 70 (1)).

These share warrants are negotiable instruments, transferable by delivery free from equities, and the bearer thereof is entitled to the shares therein specified. But no warrants can be issued except in respect of shares which are *fully paid*, nor may such warrants be issued by private companies, whilst the holding of share warrants is not a qualification for a director (S. 141 (2)).

Upon the issue of a share warrant, the name of the holder of the shares specified therein must be removed from the register, in which must be entered the following particulars:—

- (a) the fact of the *issue* of the warrant;
- (b) a statement of the *shares included* in the warrant, distinguishing each share by its number; and
- (c) the *date* of the issue of the warrant (S. 97 (1)).

On the removal of his name from the Register, a person ceases to be a “member” of the company within the strict meaning of the term, but it is usual for the Articles to provide that warrant holders may attend and vote at meetings, provided that they deposit their warrants with the company within a specified period before the date of the meeting; and subject to the Articles, the bearer of a warrant may surrender it for cancellation and have his name entered on the Register (S. 97 (2)).

Subject to any contrary statutory provisions, the bearer of a share warrant may, if the Articles of the company so provide, be deemed to be a member of the company, either to the full extent or for any purposes defined in the Articles (S. 97 (5)).



A share warrant must be stamped with a stamp valued at *three times* the *ad valorem* duty chargeable on a transfer for the nominal value of the shares (S. 1, Stamp Act, 1891). This compensates the Revenue for the duty which would otherwise be paid on each transfer.

It is a felony falsely and deceitfully to personate any owner of any share or interest in any company, or owner of any share warrant or coupon, issued in pursuance of the Act, and thereby obtain, or endeavour to obtain, any such share or interest or share warrant or coupon, or to receive or to endeavour to receive any money due to any such owner as if the offender were the true and lawful owner (S. 71).

#### § 24.—Calls on Shares.

Where shares are issued not fully paid, the holder may at any time be called upon to pay to the company the whole or any portion of the difference between the paid up and nominal value of the shares, the manner in which such calls should be made being regulated by the Articles, as in Clauses 11 to 16 of Table A.

These regulations should be observed with great care, for an irregular call is invalid, unless subsequently the defect is rectified (*Austin's Case* [1871] 24 L.T. 932).

In general, as under Table A of the Companies Act, 1929, the power of making calls is vested in the directors, and where this is the case, the power must be exercised in good faith and for the benefit of the company. If there is no evidence of bad faith, the Court cannot interfere with the exercise of the power, even on the motion of a creditor (*Poole's Case* [1878] 9 Ch. D. 322). But the Court may prohibit a call for an object which is *ultra vires* the company (*Const v. Harris* [1824] Turn. & R. 496).

The directors must not, without the sanction of the company, make an arrangement whereby they themselves are not liable for calls (*Alexander v. Automatic Telephone Co.* [1900] 2 Ch. 56). But the Articles may permit them to make calls on some of the shareholders to the exclusion of the others (S. 48). And similarly they may, if authorised by the Articles, accept from any member the whole or any part of the amount remaining unpaid on his shares, although no part of the amount has been called up (*ibid.*). But this power also must be exercised for

the benefit of the company (*Sykes' Case* [1872] 13 Eq. 255). If the Articles so permit, interest may, moreover, be paid on amounts paid up in advance of calls, and such interest, being a debt due from the company, may be paid out of capital (*Lock v. Queensland Investment and Land Mortgage Co.* [1896] A.C. 461). But the amount paid in advance cannot be repaid before the company is wound up; though, in the winding up, it is repayable in priority to the capital contributed in response to calls (*Wakefield Rolling Stock Co.* [1892] 3 Ch. 165). But an arrangement whereby sums advanced by a shareholder are, in the event of a winding-up, to be *treated* as payments made in advance of *calls* is invalid.

**Law Car Insurance Corporation** [1912] 1 Ch 405. X guaranteed an overdraft of the company in consideration of an agreement that, should he have to pay upon the guarantee, the amount so paid by him should be treated as a payment made to the company in advance of calls HELD, that the arrangement was invalid, being an attempt to set off calls against a debt due from the company

Where a call is made *before winding up*, and the company is indebted to a member, the company may, with the member's consent, apply the sum which it owes in payment of the call (*Larocque v. Beauchemin* [1897] A.C. 358).

### § 25.—Enforcement of Calls—Forfeiture.

A properly made call may be enforced by legal action against the person liable, but the Articles usually provide, as in Clauses 23 to 29 of Table A, that if a member fails to pay any call or instalments of a call on the day appointed for payment, the directors may, at any time thereafter during such time as any part of such call remains unpaid, serve a notice on him, requiring payment of so much of the call as is unpaid, together with any interest which may have accrued from the date due for payment, and informing him that if the call is not paid by a day named in the notice (which under Table A must be at least 14 days after the date of the notice), his shares will be liable to forfeiture. The procedure to be adopted in such circumstances depends wholly upon the terms of the Articles, but all that is usually required is:—

- (a) notice of intention to forfeit; and
- (b) a resolution of the directors that the shares “be and are hereby forfeited.”

In addition, it is frequently provided, as in Clauses 26 and 27 of Table A, that forfeited shares may be sold or otherwise disposed of on such terms as the directors think fit, and that the person whose shares are forfeited shall cease to be a member of the company. The shares may be re-issued by the company at any price that the directors think fit, but they cannot be credited as paid-up to a greater extent than they were paid-up at the date of the forfeiture. Under Table A, the former holder of the forfeited shares remains liable, notwithstanding the forfeiture, for calls made and unpaid at the date of the forfeiture, and if the company makes a call upon the person to whom the shares are re-issued, he also is liable (*New Balkis Eersteling v. Randt Goldmining Co.* [1904] A.C. 165). But the company cannot in these circumstances (unless the shares were originally issued at a premium), recover more than the nominal value of the shares, and if either the past or the present holder pays the call, the other is discharged from liability (*ibid.*).

If, within one year of the forfeiture of any shares, the company goes into liquidation, the former holder of the shares may be placed on the "B" List of contributories (*Creyke's Case* [1869] 5 Ch. 63). But this may not be done if the winding up takes place more than one year after the forfeiture, although, if the Articles so provide, as by Cl. 27, Table A, the former holder may still be liable as a debtor in respect of calls due at the date of forfeiture (*Ladies Dress Association v. Pulbrook* [1900] 2 Q.B. 376). And if A transfers shares to B and the shares are forfeited after the transfer, A is liable as a "B" List contributory if liquidation commences within one year of the transfer (*Bridger's and Neil's Cases* [1869] 4 Ch. 266).

The power to forfeit vested in the directors must be exercised for the benefit of the company, and may be set aside by the Court if used improperly or oppressively. Thus, the Court will interfere where the real object of the forfeiture is to:—

- (1) Remove an objectionable member (*Richmond and Painter's Case* [1858] 4 K. & J. 305).
- (2) Relieve a member from liability (*Spackman v. Evans* [1868] L.R. 3 H.L. 171).

And relief will also be given on the ground of an irregularity in the proceedings leading up to the forfeiture, as where:—

- (1) Too much interest is claimed by the notice (*Johnson v. Lyttle's Iron Agency* [1877] 5 Ch. D. 687).
- (2) A quorum is not present at the board meeting which resolves upon the forfeiture (*Bottomley's Case* [1881] 16 Ch. D. 681).
- (3) The directors have not been properly elected (*Garden Gully United Quartz Mining Co. v. McLister* [1875] 1 A.C. 39).

Clause 26 of Table A empowers the directors to cancel a forfeiture at any time before the forfeited shares have been disposed of, but this cannot be done without the consent of the former holder (*Exchange Trust* [1903] 1 Ch. 711).

**As a short cut to forfeiture, a surrender of shares may be accepted by the Directors, provided that:**

- (a) the Articles invest them with power to forfeit; and
- (b) there are circumstances which would justify the exercise of their power.

But a surrender *cannot* be accepted where there are no grounds which would entitle the directors to declare the shares forfeited (*Bellerby v. Rowland & Marwoods Steamship Co.* [1902] 2 Ch. 14).

In other cases, a surrender is unlawful as involving a reduction of the company's share capital, but it has been held that *fully paid* shares may nevertheless be surrendered in exchange for new shares, provided that the surrendered shares are not cancelled (*Rowell v. John Rowell & Sons* [1912] 2 Ch. 609).

## § 26.—Right of Lien over Shares.

No shares can be declared *forfeited* except for unpaid calls or similar debts, but the Articles frequently contain provisions, similar to those in Clauses 7 to 10 of Table A, which give to the company a *lien* over its shares in respect of *all debts due* to the company from its members. Under Table A, this right is restricted to shares which are not fully paid, but Articles may extend the right to all shares. This is not commonly done, however, as the London Stock Exchange will not give an official quotation to shares in a company which enjoys a right of lien over shares which are fully paid.

It should be observed, however, that under Clause 7 of Table A, except in respect of unpaid calls, the lien does not extend to shares standing in the names of two or more persons jointly, and for this reason, where shares are held in trust, it is usual to register them in the names of two or more trustees. But if there is only one name upon the register, the lien may be exercised notwithstanding that the registered holder is a trustee (*New London and Brazilian Bank v. Brocklebank* [1882] 21 Ch.D. 302), unless, of course at the date of the attachment of lien, the company had notice of the prior equitable interests (*Bradford Banking Co. v. Briggs & Co.* [1887] 12 App. Ca. 29. (*ante*, § 5)).

Special Articles may, however, provide that the lien shall extend to shares registered in the names of two or more persons jointly.

If no right of lien is given by the Articles, it may be taken by Special Resolution, but if a transfer is lodged before the Articles are altered, the lien cannot be exercised in respect of a debt due from the transferor (*McArthur Ltd. v. Gulf Line Co.* [1909] S.C. 732).

Table A extends the right of lien to dividends as well as to the shares themselves, and enables the company to enforce the lien by the sale of the shares, but **in no case can the lien be enforced by forfeiture**, for this would involve an unlawful reduction of capital.

The right of lien enjoyed by a company by virtue of its Articles is assignable, and a third party who discharges a debt on behalf of a shareholder may be entitled by subrogation to an assignment of the right (*Everitt v. Automatic Weighing Machine Co.* [1892] 3 Ch. 506).

A person who purchases shares to which a lien has previously attached takes them subject to the lien, but if the vendor holds other shares in the company which are also subject to the lien, the purchaser can compel the company to look primarily to the shares still held by the vendor (*Gray v. Stone* [1893] W.N. 133). But the lien cannot be exercised in respect of a debt which arises after a transfer has been lodged (*Cawley & Co.* [1889] 42 Ch.D. 209).

**Mathieson v. Gronow** [1929] 141 L.T. 553. Shares were registered in the names of three trustees, one of whom was one of the beneficiaries under the trust. The trustee-beneficiary became

indebted to the company, which had a lien over shares. HELD, that the trustees could sell the shares and give the purchaser an unencumbered title notwithstanding the company's lien.

Unless the Articles otherwise provide, the right of lien does not enable the company to do more than refuse to register a transfer of its shares or to pay dividends to the registered holder, but almost invariably (as in Table A) the company is authorised to enforce its lien by selling the shares and retaining from the proceeds the amount owed by the holder. The right of sale must not be exercised in bad faith, and the company may not retain more than its debt and the costs of realisation.

A company's lien, when arising in relation to any particular shares, creates an equitable interest in the shares in favour of the company, which by virtue of the Articles is usually the first and paramount lien on the shares, but even then it will rank subsequent to all other equitable interests in the shares notified to the company before its own equitable interest arose.

### § 27.—Mortgages of Shares.

Where shares in a company are of any real value, the holder may be able to borrow money upon the security of his holding, i.e. by mortgaging the shares. This may be done in two ways.

1. *A legal mortgage* may be effected by transferring the shares to the lender of the money on terms that they shall be re-transferred when the loan is repaid. But if this method is employed, the mortgagee, being registered as a member, is liable for calls upon the shares during the existence of the mortgage. As between the company and himself the mortgagee is the legal owner, entitled to all benefits of membership, but as between himself and the mortgagor these benefits are for the latter, who may instruct the mortgagee how to exercise his voting rights.

2. *An equitable mortgage* may be effected by depositing the share certificate with the mortgagee, together with a blank transfer, on terms that if the loan is not repaid by a certain date, the mortgagee shall be entitled to complete the instrument of transfer and get himself or his nominee registered as holder of the shares. The advantage of this method is that (a) it is less costly than the legal mortgage, and (b) the mortgagor remains liable for calls so long as his name is upon the register. But

the equitable mortgage of shares is also attended by the following disadvantages:—

- (a) The mortgagee has nothing more than an equitable interest in the shares.
- (b) A legal mortgagee, though later in point of time, will obtain priority by registration.
- (c) A fraudulent mortgagor may defeat the mortgage by obtaining a new share certificate from the company, on the grounds that he has lost the original certificate, and transferring the shares before the completion of the blank transfer.

In practice, these difficulties are not frequently encountered, and equitable mortgagees content themselves with giving notice of their interests to the company, but although such notices give them some slight measure of protection by virtue of the decision in *Bradford Banking Co. v. Briggs & Co.* (*ante*, § 5), they do not impose upon the company a duty to refuse to register subsequent transfers of the shares, and the protection afforded is, therefore, incomplete. But against this danger, the mortgagee can protect himself by giving notice under Order XLVI r. 4 of the Rules of the Supreme Court or “notice in lieu of distringas” as it is sometimes called. This involves the filing of an affidavit at the Central Office, which serves notice on the company to the effect that no transfer of the shares specified must be registered until 8 days after notice of the lodgment of the transfer has been given to the mortgagee. In this manner, the mortgagee obtains information of any proposed transfer and has 8 days in which to take steps to prevent it from being registered.

It may be added that this procedure may also be adopted by the beneficial owners of shares which are registered in the name of a trustee.

Some additional difficulty may be encountered in relation to blank transfers, where the Articles require a transfer of shares to be by deed, for once a deed has been signed, sealed and delivered, no addition may be made thereto. But this difficulty may be overcome by supplying the mortgagee with a power of attorney, authorising him to execute and complete the transfer on behalf of the mortgagor.

Persons who have interests in shares less than the legal ownership will have equitable interests only; and since in relation to shares there may be a number of equitable interests vested in different persons, it is a matter of great importance to decide the priority of these interests. As a general rule it may be stated that the order of priority of equitable interests is the order in which they are created, and this is not affected by any holder of an equitable interest notifying the company of his interest; but an equitable interest will lose its priority to a subsequent interest which has arisen by the negligence of the holder of the prior interest. The equitable interest of the company by virtue of its lien will rank in priority to all equitable interests not notified to the company when its lien was created in relation to a particular debt.

### § 28.—Dividends on Shares.

The profits of a company are distributed among the members in the form of dividends, in accordance with the provisions of the Articles. Thus, it is provided by Clauses 89 and 90 of Table A that:—

- (a) the company in general meeting may declare dividends; and
- (b) the directors may from time to time pay such interim dividends as appear to be justified by profits.

Clause 92, moreover, provides that dividends are to be paid “ACCORDING TO THE AMOUNTS PAID” on the shares, and this is understood to mean “according to the amounts paid *from time to time*” where calls or payments have been made during the period covered by the dividend; but the Articles may of course provide otherwise, e.g. that dividends be paid in proportion to the AMOUNT PAID UP, i.e. on the amount paid up at the date of the declaration of the dividend, irrespective of the date of payments on the shares.

**Oakbank Oil Co. v. Crum** [1882] 8 A C 65. The Articles provided that dividends were to be paid to the members “in proportion to their shares.” HELD, that this means in proportion to the nominal value of the shares, without regard to the amount paid up.

And it appears that, where the Articles do not otherwise provide, dividends should be paid in proportion to the nominal value (*ibid.*), regardless of amount(s) paid (up).



Where there are shares upon which sums have been paid in advance of calls, the Articles may authorise dividends to be paid in respect of the full amount paid up, but Clause 92 of Table A provides that this shall not be done where interest is paid on the sums paid in advance of calls.

**In the absence of provision to the contrary in the Articles, dividends must be paid in cash** (*Wood v. Odessa Waterworks Co.* [1889] 42 Ch.D. 636). But it is usual to permit a distribution in specie. The declaration of a dividend by the company creates a specialty debt recoverable by action brought within twenty years (*Drogheda Steam Packet Co.* [1903] Ir. Rep. 512). But no debt is created by the *declaration* of an interim dividend by the directors (*Lagunas Nitrate Syndicate v. Schroeder* [1901] 85 L.T. 22).

Notwithstanding anything to the contrary in the Articles or Memorandum, **dividends cannot be paid out of Capital**, for so to pay them would necessarily involve a reduction of capital, and this may not be effected except in accordance with the specific provisions of the Act. Directors who utilise any portion of the capital of a company to pay dividends are personally liable for the amount so paid (*Oxford Benefit Building Society* [1887] 35 Ch.D. 502). But restitution cannot be compelled by members who were aware that the payment was unlawful (*Towers v. African Tug Co.* [1904] 1 Ch. 558); though in such a case, the members themselves may be called upon to refund the amounts received by them (*Moxham v. Grant* [1900] 1 Q.B. 88). In any event, the liability of directors ceases when the amount paid out of capital is made good out of subsequent profits (*Boaler v. Watchmakers' Alliance* [1903] Acct. L.R. 23).

In determining what is and what is not available for dividend two distinct and diverse rules must be observed, namely:—

- (1) That dividends must not be paid out of capital; and
- (2) That dividends must be paid out of profits only.

“The first is a requirement of the statutes and cannot be dispensed with; the latter is in Table A . . . and is one of the regulations of the company which has to be construed” (per Farwell, J. in *Bond v. Barrow Hæmatite Steel Co.* [1902] 1 Ch. 353).

“If, therefore, any part of the excess of current receipts [income] over current payments [expenditure] represents

capital, this part must not be distributed among the shareholders. For this reason floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law" (per Lindley, L.J. in *Verner v. General and Commercial Investment Trust* [1894] 2 Ch. 268). But "fixed capital may be sunk or lost and yet the excess of current receipts over current payments may be divided" subject to any contrary provision in the Articles or any contract with the creditors (*ibid.*).

Thus, depreciation in the value of goodwill (fixed capital) need not be made good, but a depreciation in the value of stock in trade (circulating capital) must be made good, before the profit can be ascertained. It is not always easy, however, to determine whether lost capital was fixed or circulating, and in case of doubt directors are advised to make good all losses.

**Bond v. Barrow Hæmatite Co.** [1902] 1 Ch. 353 A company formed to manufacture steel bought certain mines and erected furnaces and cottages for the miners. These assets depreciated considerably in value. HELD that, having regard to the company's objects, the assets must be regarded as "circulating capital" and the loss must therefore be made good before arriving at profits available for dividends.

An increase in the value of the company's assets may be distributed as part of the profits for dividend purposes, when the assets concerned have been realised (*Lubbock v. British Bank of South America* [1892] 2 Ch. 198), and the surplus remains after the whole accounts have been fairly taken (*Foster v. New Trinidad Lake Asphalt Co.* [1901] 1 Ch. 208).

**Re Spanish Prospecting Co.** [1911] 1 Ch. 92. It was agreed that X and Y should serve a company at a monthly salary payable only out of profits. The company purchased fully paid shares in another company, and later realised the same at a profit. HELD that the profit so obtained was available for the payment of X's and Y's salaries.

As to the meaning of the term "profits" where this appears in the Articles, the question must be answered "according to the *circumstances of each particular case*, the nature of the company, and the evidence of competent witnesses" (per Farwell, J. in *Bond v. Barrow Hæmatite Steel Co.* [*supra*]). It is impossible to be more precise than this for "the mode and manner in which the business is carried on and what is usual or the reverse may

have a considerable influence in determining the question" (per Lord Halsbury in *Dovey v. Cory* [1901] A.C. 477).

Profits do not cease to be available for dividends by reason only of the fact that they have been carried to reserve or used to write off goodwill.

**Stapley v. Read Bros. Ltd.** [1924] 2 Ch. 1. Over a period of years, the company used its profits to write off goodwill, which originally stood in the Balance Sheet at £140,000. In 1918, the goodwill account was removed from the balance sheet by reducing a reserve fund built up out of profits to £10,000. In 1920, the balance of this fund, together with the profit and loss balance for the year, was capitalised by the issue of £40,000 in bonus shares. In 1921 and 1922, there was a loss, and the directors proposed to write off the debit balance of profit and loss account by writing back to reserve the sum applied in writing off goodwill. HELD that as the company had not finally and irrevocably capitalised the profits used to write off the goodwill, there was nothing to prevent them from writing back the sum which was required to balance the profit and loss account.

### § 29.—Interest on Shares issued for Construction Purposes.

Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up, and may charge the sum so paid by way of interest to capital as part of the cost of construction of the work or building, or the provision of plant (S. 54 (1)). But this power is strictly subject to the following limitations:—

- (a) no such payment shall be made unless it is authorised by the ARTICLES or by Special Resolution:
- (b) no such payment, whether authorised by the Articles or by special resolution, shall be made without the PREVIOUS SANCTION OF THE BOARD OF TRADE:
- (c) before sanctioning any such payment, the Board of Trade may, at the expense of the company, appoint a person to inquire and report to them as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the INQUIRY:

- (d) the payment shall be made only for such PERIOD as may be determined by the Board of Trade, and that period shall in no case extend beyond the close of the half year\* next after the half year during which the works or buildings have been actually completed or the plant provided:
- (e) the rate of interest shall in no case exceed FOUR PER CENT. PER ANNUM OR SUCH OTHER RATE as may for the time being be prescribed by Order in Council:
- (f) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid:
- (g) the ACCOUNTS of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate (S. 54 (1)).

In relation to (e), the *Companies (Interest out of Capital) Order* of December, 1929, fixed "such other rate" for the time being at six per cent. per annum.

If default is made in complying with (g), the company and every officer in default is liable to a fine not exceeding £50 (S. 54 (2)).

It has been held, moreover, that where sums are paid in advance of calls on terms that interest is to be paid thereon, such interest may in default of profits be paid out of capital (*Lock v. Queensland Investment Co.* [1896] A.C. 461).

\* The "half years" appear to run from the date of the Board of Trade sanction, and not in relation to the company's own financial year.



## ABSTRACT OF CHAPTER VII

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### CAPITAL

- § 1.—CLASSIFICATION OF CAPITAL.
- § 2.—ALTERATION OF CAPITAL.
- § 3.—REDUCTION OF CAPITAL.
- § 4.—PROCEDURE ON REDUCTION OF CAPITAL.
- § 5.—FORM OF REDUCTION OF CAPITAL.
- § 6.—LIABILITY ON REDUCTION OF CAPITAL.
- § 7.—REORGANISATION OF CAPITAL.



## CHAPTER VII

# CAPITAL

### § 1.—Classification of Capital.

The word “capital” is used in so many different senses, that it seems desirable at the outset to explain these different usages.

*Nominal (Authorised or Registered) Capital* is that amount of share capital, declared in the Memorandum, which the company is authorised to issue.

*Subscribed Capital* is that portion of the nominal capital of the company which has been subscribed for. This capital may be considered *the* capital of the company, as it represents that capital which the members have actually contributed, or have agreed to contribute, when called upon to do so. It is sometimes referred to as the *Issued Capital*.

*Paid-up Capital* is that portion of the subscribed or issued capital of the company which has been paid up in cash or cash equivalent. Where all shares are fully-paid, the subscribed and paid-up capitals are identical.

*Uncalled Capital* is that portion of the subscribed capital which has not yet been called up, and which remains a liability of the shareholders.

*Reserve Capital.* A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid (S. 49).

It will be noted that S. 49 reserves such capital specifically for the purposes of a liquidation, and consequently, as was decided in *Bartlett v. Mayfair Property Co.* [1898] 2 Ch. 28, the company cannot charge such property in favour of debenture-holders, and even if the terms creating a charge incorporate the reserve capital, the term would be invalid to that extent.



Reserve capital may, however, be cancelled on a reduction of capital (*Midland Railway Carriage Co.* [1907] W.N. 175).

*Debenture Capital.* This is a misuse of the term capital, representing that amount of money which the company has borrowed upon the security of its assets.

The promoters, prior to incorporation, are free to determine what the nominal capital of the proposed company shall be; when it is so fixed, it must be disclosed, except in the case of unlimited companies, in the Memorandum, in what is known as the capital clause. The Act provides that the Memorandum, in the case of a company limited by shares, must state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount. Thus, to disclose the nominal capital in the Articles only is not sufficient, and if shares of different nominal amounts are intended to be issued, the Memorandum must accordingly specify the amounts. This does not mean that if deferred or preferential shares are being issued, the detail must be disclosed in the Memorandum, for, as previously stated, the Articles may classify the shares and give special privileges to the different classes of shares.

## § 2.—Alteration of Capital.

At some point of time during the history of the company, it may be found necessary to alter the capital of the company, e.g. to increase the capital, or to convert shares into stock, and since this involves an alteration of the Memorandum, the legislature has provided to what extent and subject to what conditions it may be altered. Thus, a company limited by shares or a company limited by guarantee and having a share capital, if so authorised by its Articles, may alter the conditions of its Memorandum as follows: it may—

- (a) increase its share capital by the issue of new shares of such amount as it thinks expedient;
- (b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;
- (c) convert all or any of its paid-up shares into stock, and reconvert that stock into paid-up shares of any denomination;

- (d) subdivide its shares, or any of them, into shares of smaller amount than is fixed by the Memorandum, so, however, that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;
- (e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled (S. 50 (1)).

But the powers conferred by this Section must be exercised by the company in general meeting (S. 50 (2)), so that it would be illegal and *ultra vires* for the Articles to provide for alteration by "resolution of directors" or by "the managing director."

The Articles may provide for the exercise of these powers by any form of resolution passed by the company in general meeting. [See also Clauses 34 to 38 of Table A.]

(a) *Increase of Capital.*

The nominal capital of a company may be increased, although it has not yet issued all its capital, but this is unusual; the power to increase is generally exercised when a company, in need of further capital, has issued the whole of its authorised capital.

When the alteration has been effected, notice must be given to the Registrar of Companies within 15 days after the passing of the necessary resolution (S. 52); and all such alterations must be embodied in all copies of the Memorandum issued subsequently (S. 24).

The exercise of the power to increase is subject to any restrictions in the Memorandum. Thus, if the Memorandum provides that no preference or deferred shares may be issued, or that specified preferential rights shall be irrevocably attached to a particular class of shares in the original capital, or that shares created by a subsequent increase shall not be preference shares, then the subsequent increase must not contravene such provisions. Where, however, as is most usual, the Memorandum contains no such restrictions, the company may increase its capital and issue shares with preferential or other rights attached thereto.

(b) *Consolidation of Shares.*

If a company having a share capital has consolidated and divided its share capital into shares of larger amount than its pre-existing shares, it must within one month after so doing give notice thereof to the Registrar of Companies, specifying the shares consolidated (S. 51).

(c) *Conversion to Stock.*

A company cannot make an original issue of stock (*Home and Foreign Investment Co.* [1912] 1 Ch. 72); and any issue so made, even by way of bonus, is void. In accordance with S. 51, the company must give notice of the conversion to the Registrar of Companies within one month, specifying the shares converted or the stock reconverted.

Stockholders, when registered by entry on the Register of Members in accordance with the provisions of S. 95 (1), are members of the company, and their rights and liabilities, excepting in so far as they are expressly provided for in the Act, are regulated by the Articles of the company. The provisions in the Articles are generally similar to those in Clauses 31 to 33 of Table A.

The company may issue stock warrants in the same way as it issues share warrants, the rights of holders being similar to those of the holders of share warrants.

(d) *Sub-division of Shares.*

By S. 50, any such resolution of the company in general meeting as is specified by the Articles is sufficient. Shares may be consolidated and sub-divided by one and the same resolution (*North Cheshire Brewery* [1920] W.N. 149).

Sometimes special provisions are contained in the Articles, giving the company power, on sub-division of shares, to attach preference rights to some of the shares resulting from the sub-division as against the other shares.

Notice of sub-division of shares, specifying the shares sub-divided, must be given to the Registrar of Companies within one month of the alteration (S. 51).

(e) *Cancellation of Unissued Shares.*

A cancellation of unissued shares within the provisions of S. 50, although it involves a reduction of the nominal or

authorised capital of the company, is not deemed to be a reduction of share capital within the meaning of the Act (S. 50 (3)).

In contrast with the statutory reductions of capital under S. 55, cancellation of unissued shares may be effected by an Ordinary Resolution, if the Articles permit, and does not require sanction of the Court. S. 51 requires notice of cancellation, specifying the shares cancelled, to be given to the Registrar of Companies within one month of the alteration.

### § 3.—Reduction of Capital.

There are many forms of reduction of capital provided for in the Act, some of which may be effected only with the consent of the Court, whilst others do not require such confirmation.

Reduction of capital without consent of the Court may be effected in the following ways:—

- (1) A company may forfeit shares for non-payment of calls, and if the Articles permit, may cancel the forfeited shares.
- (2) A Company may accept a surrender of shares, provided that the company is in a position to forfeit them. "Every surrender of shares, whether fully paid-up or not, involves a reduction of capital which is unlawful, except where sanctioned by the Court under the Companies Acts. Forfeiture is a statutory exception and is the only exception" (Per Cozens Hardy, L.J., in *Bellerby v. Rowland and Marwood's S.S. Co.* [1902] 2 Ch. 265).
- (3) A company may cancel unissued shares under the provisions of S. 50; but, as already noted, such cancellation is not deemed to be a reduction of share capital.

Apart from the aforementioned cases, all other forms of reduction of capital require the consent of the Court. The statutory power of reducing capital is mainly governed by S. 55, which provides that, subject to confirmation by the Court, a company limited by shares or a company limited by guarantee may, if so authorised by its Articles, by Special Resolution, reduce its share capital *in any way*, and alter its Memorandum accordingly.

Power to reduce must, therefore, be granted in the Articles of the company and it will not be sufficient if the Memorandum

alone makes provision therefor (*re Dexine Patent Packing Co.* [1903] 88 L.T. 791).

If the Articles do not grant such power, they may be altered by a Special Resolution giving such power, and this alteration must be completed before the Special Resolution *reducing the capital* can be passed.

Although S. 55 allows a reduction of capital to be effected "*in any way*," without prejudice to the generality of that power, a company may in particular:—

- (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or
- (b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or
- (c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company.

The Court is free to confirm any form of reduction, provided only that dissentient creditors having a right to object are provided for.

#### § 4.—Procedure on Reduction of Capital.

By virtue of the provisions of S. 56, where a company has passed a resolution for reducing capital, it may apply by petition to the Court for an order confirming the reduction.

The main purpose of this petition is to give *creditors* an opportunity to dissent, and also to satisfy the Court that such creditors have been safeguarded in some way. The Court does not test the validity of the form of the proposed reduction—although due consideration must be given to the equities and rights of all parties, shareholders and creditors—as the company itself must decide whether there should be a reduction of capital, and if so, how it should be carried into effect.

Some forms of reduction of capital will not prejudice the rights of creditors. Thus, if a company proposes to reduce its capital by cancelling paid-up share capital which is lost or unrepresented by available assets, it cannot be said that the rights of creditors are involved, as such a reduction will not operate to deprive them of any fund which would, but for the

reduction, be available for them. In such cases, the creditors would have no right to object, except in very exceptional circumstances, and they would not be entitled to take advantage of the statutory provisions relative to dissentient creditors.

In other cases, however, where the proposed reduction of share capital involves either DIMINUTION OF LIABILITY in respect of unpaid share capital OR the PAYMENT TO ANY SHAREHOLDER of any paid-up share capital, and in any other case if the Court so directs, S. 56 provides that:—

- (a) Every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction:
- (b) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction:
- (c) Where a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount:—
  - (i) If the company admits the full amount of the debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim;
  - (ii) If the company does not admit and is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

**Arizona Copper Co.** [1926] S.C. 315. In a petition by a limited company for confirmation of a reduction of capital, it appeared that unclaimed dividends were outstanding to the amount of £4,397 and that an amount was lying in the company's dividend (banking) account in respect of these dividends. The company was unable to obtain a discharge of these claims from the persons entitled thereto; neither could it obtain their consent to the proposed reduction; and these persons objected to the reduction. The Court, without deciding whether or not such persons were *creditors*, held that, even if they were creditors, they could not object to the reduction, as the company, by maintaining a separate dividend (banking) account to which the unclaimed dividends were duly paid, had done all by way of appropriation that the Court would be justified in requiring.

However, if the special circumstances of the case warrant it, the Court may deprive such creditors of these rights.

The next step in the procedure is the confirmation order of the Court. In accordance with S. 57, the Court, if satisfied with respect to every creditor of the company who is entitled to object to the reduction, that either his consent to the reduction has been obtained, or his debt or claim has been discharged or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

Where the Court makes any such order, it may:—

- (a) if for any special reason it thinks proper so to do, make an order directing that the company shall, during such period, commencing on or at any time after the date of the order, as is specified in the order, add to its name as the last words thereof the words "AND REDUCED"; and
- (b) make an order requiring the company to publish as the Court directs, the REASONS FOR REDUCTION or such other information in regard thereto as the Court may think expedient, with a view to giving proper information to the public, and, if the Court thinks fit, the CAUSES which led to the reduction (S. 57 (2)).

Where a company is ordered to add to its name the words "and reduced," those words must, until the expiration of the period specified in the order, be deemed to be part of the name of the company (S. 57 (3)).

By virtue of S. 58, a COPY OF THE ORDER of the Court confirming the reduction, together with a COPY OF A MINUTE

approved by the Court showing with respect to the capital as altered (i) the amount of capital, (ii) the number of shares into which it is to be divided, (iii) the amount of each share, and (iv) the amount paid up on each share, must be delivered to the Registrar of Companies: on registration, the resolution for reduction becomes effective.

The Registrar must then certify the registration of the order and minute, which certificate is to be conclusive evidence that all the requirements of the Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute. The certificate is conclusive evidence even though it be subsequently shown that the Articles of the company contained no power to reduce capital (*Walker and Smith, Ltd.* [1903] 88 L.T. 792); or that the special resolution for reduction was invalid (*Ladies Dress Association v. Pulbrook* [1900] 2 Q.B. 376).

In accordance with the provisions of S. 24, every copy of the Memorandum issued after the date of the reduction must be in accordance with the registered minute of reduction.

It was held in *re Imperial Chemical Industries, Ltd.* [1937] C.A., that where directors sent shareholders particulars of a scheme of reduction and reorganisation of capital, there was no obligation upon the directors to disclose to these shareholders their holdings or interests in the different classes of shares

### § 5.—Form of Reduction of Capital.

It has already been noted that the Court has power to sanction any form of reduction, and although it is not the duty of the Court to question the *necessity* of a reduction, or to consider the actual form of the proposed reduction, it is nevertheless the duty of the Court to be satisfied that dissenting creditors are protected, and also to test the validity of the proposed reduction from the point of view of its “fairness” as to the shareholders. That is to say, it does not follow, merely because the proposed reduction has been agreed to by a Special Resolution of the shareholders, that the confirmation of the Court will be given, for the Court has power to refuse it. “The question to be considered is: Is the reduction fair and equitable as between the different classes of shareholders?” (Per Lord Macnaughten, in *Poole v. National Bank of China* [1907] A.C. 228).



The petition which requests the Court to sanction a reduction of capital must state the reason for the reduction. Where capital is to be written off because it has been lost or is not represented by available assets, *prima facie* evidence of the loss of capital must be given. Where, however, capital has been sunk in preliminary expenses and is represented by goodwill, it is not "unrepresented by available assets" (*Abstainers Co.* [1891] 2 Ch. 124); and assets representing a reserve fund or a credit on profit and loss account will be treated as available assets (*Barrow Steel Co.* [1901] 2 Ch. 746).

**Hoare & Co.** [1904] 2 Ch 208. Accumulated profits carried to a reserve fund had been employed in the business, and a loss had been incurred. HELD, the loss should be apportioned rateably between the paid-up capital and the reserve fund, and that only the proportion attributed to the paid-up capital was "lost capital." Assets representing the reserve fund were, however, "available assets."

Where sanction for a reduction is applied for on the ground that it is in excess of the wants of the company, the Court may authorise a return of paid up capital to members notwithstanding that the terms of the resolution compel the shareholders to take up debentures (*Thomas de la Rue and Co.* [1911] 2 Ch. 361).

In general, where preference shares are not preferential as to capital, a scheme of reduction should provide for *pari passu* distribution of the loss among all shareholders (*Mackenzie & Co.* [1916] 2 Ch. 450). But where there are shares with preference as to capital, the loss should primarily be borne by the ordinary shares as in a winding up (*Floating Dock of St. Thomas* [1895] 1 Ch. 691).

## § 6.—Liability on Reduction of Capital.

By S. 59 on a reduction of share capital:—

"a MEMBER of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference, if any, between the amount of the share as fixed by the minute and the amount paid, or the reduced amount, if any, which is to be *deemed* to have been paid, on the share, as the case may be."

As an example, if each £1 share, 12s. 0d. paid up, and 8s. 0d. uncalled, is reduced by the minute to a nominal amount of

15s. 0d., the liability of the member might be approved by the Court as:—

- (1) 15s. 0d., less the 12s. 0d. paid, i.e. as 3s. 0d. per share; or
- (2) 15s. 0d., less (say) 7s. 0d. [the 5s. 0d. deducted from the original nominal value being also deducted from the original sum paid], i.e. as 8s. 0d. per share [being an amount equal to the original uncalled liability].

It is further provided that if any CREDITOR, entitled in respect of any debt or claim to object to the reduction of share capital is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of the Act with respect to winding up by the Court, to pay the amount of his debt or claim, then:—

- (a) every person who was a member of the company, at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before the said date; and
- (b) if the company is wound up, the Court on the application of any such creditor and proof of his ignorance as afore-said, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list, as if they were ordinary contributories in a winding-up.

### § 7.—Reorganisation of Capital.

The phrase “reorganisation of capital” is not used in the Act. It covers a number of important operations, however, which may be carried out in various ways. Thus, where shares are sub-divided or consolidated there is a reorganisation of capital, in which event, if only the unit value of the shares is affected, the procedure laid down by S. 50 of the Act must be observed (see *ante* § 2).

There are, however, operations commonly spoken of as reorganisations of capital which are not governed by S. 50, since they involve neither an alteration of the authorised

capital, nor the number of shares, nor the nominal value of the shares. An alteration of the rate of preference dividend, or the conversion of ordinary shares into preference shares would fall under this heading. Such operations necessitate the variation of shareholders' rights.

*Rights given to shareholders by the Articles* may be altered by special resolution, unless the Articles prescribe some alternative procedure. Thus, where the rate of preference dividend is fixed by the Articles and not by the Memorandum, it may be varied from time to time by special resolution in the absence of alternative provisions in the Articles. Clause 3 of Table A contains alternative provisions. Consequently, where Table A applies, the rights of a particular class of shareholder may not be varied except in the manner prescribed by that Clause.

*Rights given to shareholders by the Memorandum* may be varied by the procedure (if any) prescribed by the Memorandum. Thus, where the rate of preference dividend is fixed by the Memorandum and not by the Articles, it is the custom to include in the Memorandum provisions for varying the rights of a class of shareholders similar to those in Clause 3 of Table A.

Where any such provision is made by the Memorandum or Articles, the holders of not less than 15 per cent. of the issued shares of the class concerned, being persons who did not consent to or vote in favour of the variation, may apply to the Court to have the variation cancelled (S. 61 (1)). Such an application to the Court must be made within 7 days after the date on which the necessary consent was given or the resolution passed; and once an application has been made, the variation agreed upon cannot be carried out except with the consent of the Court (*ibid.*).

The applicants for an order may appoint any one of their number in writing to make the application (S. 61 (2)). An order of the Court disallowing or confirming the variation is final (S. 61 (4)); and within fifteen days of the order an office copy must be filed with the Registrar (S. 61 (5)).

Where the Memorandum does not make provision for the variation of shareholders' rights, it is not possible to vary rights given in the Memorandum unless the sanction of the Court is obtained. In such cases the procedure prescribed by S. 153 is adopted (See Ch. XXIII, § 1).

## ABSTRACT OF CHAPTER VIII

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### DEBENTURES

- § 1.—THE BORROWING POWERS OF A COMPANY.
- § 2.—POWER TO CHARGE ITS PROPERTY.
- § 3.—MORTGAGES AND DEBENTURES.
- § 4.—SECURED DEBENTURES.
- § 5.—REDEEMABLE AND PERPETUAL DEBENTURES.
- § 6.—PRIORITY AMONG DEBENTURE-HOLDERS.
- § 7.—DEBENTURES PAYABLE TO REGISTERED HOLDER.
- § 8.—DEBENTURES PAYABLE TO BEARER.
- § 9.—REGISTRATION OF MORTGAGES AND CHARGES.
- § 10.—PARTICULARS TO BE REGISTERED.
- § 11.—EFFECT OF NON-REGISTRATION OF CHARGES.
- § 12.—AGREEMENTS TO ISSUE DEBENTURES.
- § 13.—RIGHT TO INSPECT REGISTERS.
- § 14.—RE-ISSUE OF REDEEMED DEBENTURES.
- § 15.—NATURE AND EFFECT OF TRUST DEEDS.
- § 16.—REMEDIES OF DEBENTURE-HOLDERS.
- § 17.—WHO MAY BE APPOINTED RECEIVER.
- § 18.—STATUS OF THE RECEIVER.
- § 19.—RECEIVER AND THE COMPANY'S CONTRACTS.
- § 20.—BORROWING BY A RECEIVER.
- § 21.—PROPERTY OBTAINABLE BY RECEIVER.
- § 22.—REMUNERATION OF RECEIVER.
- § 23.—ACCOUNTS OF RECEIVERS AND MANAGERS.



## CHAPTER VIII

# DEBENTURES

### § 1.—The Borrowing Powers of a Company.

The power of a company to borrow is governed by the doctrine of *ultra vires* discussed in Chapter IV; but, apart from express provision in the Memorandum, it is well established that every trading company has an implied power to borrow. In the majority of cases, however, the Memorandum gives *express power* to borrow, and occasionally it is provided, in addition, that the *amount* to be borrowed shall be limited, or that the directors shall not exercise the power unless they first obtain the sanction of the company in general meeting. Where, in such a case, the power given by the Memorandum is exceeded, then:

- (1) If the borrowing is *ultra vires* the company, e.g. where the amount which may be borrowed is expressly limited by the Memorandum, no legal or equitable debt is created, and any charge given by way of security is void (*Howard v. Patent Ivory Co.* [1888] 38 Ch.D.156).
- (2) If the borrowing is merely *ultra vires* the directors, e.g. where the Articles require the sanction of the company in general meeting, the transaction may be ratified by the company or may be rendered valid under the rule in *Royal British Bank v. Turquand* [*ante*, Ch. IV, § 12].

The effect of a borrowing which was *ultra vires* the company was considered at length in *re The Birkbeck Permanent Benefit Building Society* [1912] 2 Ch. 183, in which it was held that the consequences were as follows:—

- (a) No legal or equitable debt was created by the loans, but the money lent did not become the property of the company.
- (b) If, therefore, it was still possible to identify the money, e.g. by proving that it had been used to purchase specific investments, it was recoverable.

- (c) If, on the other hand, it was not still identifiable, no action for its recovery would lie, but if it could be shown that together with other moneys belonging to the company, it had been used to create assets, a proportion of the assets so created would belong to the lenders.
- (d) If, moreover, the money had been used to pay the company's legal liabilities, the lenders would be entitled to stand in the shoes of the creditors who had been paid; but this right does not give the lenders the right to any security held by the creditors paid off (*Wrexham, Mold and Connah's Quay Co.* [1899] 1 Ch. 440)

In addition to the foregoing rights, the lenders are entitled to obtain an injunction restraining the company from parting with the money, and to recover damages from the directors for breach of warranty of authority (*Weeks v. Propert* [1873] L.R. 8 C.P. 427). But this right to recover damages from the directors can only arise if there is nothing to show from an examination of the Memorandum and Articles that the particular borrowing was *ultra vires*, for in such cases the directors are deemed to have warranted either that the company has the necessary power, or that they had power to bind the company on the transaction.

### § 2.—Power to Charge Its Property.

If a company has power to borrow money, it has also power to mortgage or charge its assets as security for loans, unless this power is denied or restricted by the Memorandum. The power to create a charge may extend to book debts and uncalled capital, but no charge can be created over a reserve liability (*Bartlett v. Mayfair Property Co.* [1898] 2 Ch. 28), or the liability of the members of a guarantee company (*Pyle Works Ltd.* [1890] 44 Ch. D. 574), or the statutory books (*Engel v. South Metropolitan Co.* [1892] 1 Ch. 442).

### § 3.—Mortgages and Debentures.

The nature of the charge created by a company as security for a debt depends upon the terms of the agreement made with the lender, but in general, it may be said that a company may create all or any of the charges which a natural property owner can create. Thus, a company can grant legal mortgages of its lands, or create equitable mortgages by deposit of title deeds, or

create charges over its chattels; and all of these methods are, in fact, employed. But although companies frequently create mortgages after the manner of natural persons, they enjoy a privilege of such extreme value, that the majority of their borrowings are committed thereunder, i.e. the privilege of issuing debentures.

A debenture is a document issued by a company in acknowledgment of a debt, not arising out of an ordinary trading transaction of the company, but most debentures give to the holders a charge over the company's assets. A document which acknowledges a debt may be a debenture, notwithstanding that it creates no charge and does not bear the seal of the company.

**Lemon v. Austin Friars Investment Trust Ltd.** [1926] Ch. 1. To lenders of money the defendant company issued a number of "income stock certificates," which declared that the company was indebted to the persons named therein. The certificates did not create a charge over the company's assets, or fix a date for repayment of the loan, nor did they bear the company's seal, but they did provide that three-fourths of the company's profits were to be applied in redeeming the certificates, and that a register of certificate holders was to be kept at the company's office. It was HELD that these certificates were debentures.

As debentures are made payable either to bearer or to the registered holder, they are as readily transferable as a company's shares, and a creditor who holds debentures is, therefore, in a more advantageous position than one who does not, for it is easier to transfer a debenture than to assign the right to a debt under S. 136, Law of Property Act, 1925.

A company may issue a single debenture to one creditor, but in practice it is more usual to issue these documents in series, and to invite the public to subscribe for them. Thus, a company desirous of borrowing £10,000 might either obtain an overdraft from the bank in consideration of the issue of a single debenture, or it might issue a series consisting of 1,000 debentures of £10 each, inviting the public to apply for the same. In the latter case, if the debentures were secured, the subscribers would acquire a common interest in the assets charged, ranking *pari passu* for the purposes of repayment, unless the terms of issue provided otherwise. It will be observed, therefore, that this power to issue debentures enables a company to borrow large sums from the public in a manner which would otherwise be impossible.



What is known as "debenture stock" differs from debentures as "stock" differs from shares, i.e. debenture stock must be fully paid and the holders may divide their holdings into whatever fractions they please (subject to any restrictions), but except in these respects, there is no material difference between the rights of the holders of debentures and those of the holders of debenture stock.

#### § 4.—Secured Debentures.

Where, as in the majority of cases, security is given to the subscribers of debentures, the documents issued are necessarily more elaborate than those issued when no charge is created. Where the debentures are issued to a small group of persons, the charge may be created by the debentures themselves, but where the public are invited to subscribe, it is usual to have a trust deed in addition to the debentures, and in such cases the charge is created by the deed. The debenture trust deed evidences the whole relationship existing between the three parties, the company, the trustees for the debenture-holders and the debenture-holders themselves. The trust deed therefore operates, *inter alia*, to convey the property by way of charge, to appoint trustees and provide for vacancies, to specify the remedies available (e.g. the appointment of a receiver), to specify when the remedies shall be exercised, to prescribe the duty of the company in relation to the property (e.g. to keep it properly insured), and to define the rights, remuneration and agency of the receiver.

The charges created by the trust deed may be either fixed or floating charges.

A fixed charge, being in the nature of a specific mortgage, invests either the debenture-holders or a trustee appointed on their behalf with the legal title to the property charged. The company cannot, therefore, sell or otherwise dispose of the assets charged, except subject to the rights of the debenture-holders. Thus, if after creating a fixed charge over its lands, a company sells the same, the purchaser will acquire only a title subject to the charge. For this reason, it is impracticable to create a fixed charge over assets which must be disposed of in the course of the company's business, e.g. trading stock.

A floating charge, on the other hand, invests the debenture-holders with an equitable title in the assets charged, and the company is therefore at liberty to sell, mortgage, or otherwise

dispose of the same free from the charge. In the case of *Illingworth v. Houldsworth* [1904] A.C. 355, in contrasting a floating with a fixed charge the judge stated "a specific charge is one that, without more, fastens on ascertained and definite property or property capable of being ascertained and defined. A floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp." Consequently, a floating charge enables a company to charge a class of assets, e.g. book debts, which vary in substance from time to time, and to carry on its business until an event occurs which causes the charge to "crystallise." Thus, if book debts form the subject matter of a floating charge, the moneys received from day to day in the discharge of such debts may be employed by the company for the ordinary purposes of its business, and the present value of the security may, therefore, differ from hour to hour as old liabilities are discharged and new liabilities incurred. But when "crystallisation" takes place, e.g. when the company goes into liquidation or a receiver is appointed, the book debts as at that date are subject to the charge.

From the debenture-holders' point of view, a floating charge is less advantageous than a fixed charge, for the following reasons:—

- (1) The company may create a fixed charge over the assets to take priority over the floating charge.
- (2) The assets may be attached under a garnishee order, or by a landlord distraining for rent, or by a sheriff under a writ of *fi. fa.*
- (3) Preferential creditors take priority over creditors secured by a floating charge (S. 78).

### § 5.—Redeemable and Perpetual Debentures.

Debentures are usually made redeemable at the expiration of a term of years, but they may be made redeemable on demand or they may be irredeemable (S. 74). When debentures are redeemable on a fixed date, the company cannot redeem at an earlier date, unless the power to do so is reserved by the debentures, but in every case the date of redemption depends upon

the terms of the debentures, and may be accelerated by the winding up of the company.

Where a debenture is expressed to be "irredeemable," the company usually has no power to pay off the debenture-holders, who become entitled to a perpetual annuity, unless the company goes into liquidation; but in some cases the word implies only that the debenture-holders are not entitled to call for a redemption, and where the context shows that the term is used in this sense, the company's right to redeem is not affected. Debentures which are irredeemable are known as *perpetual* debentures.

Notwithstanding that any term in a debenture instrument which "clogs the equity of redemption" is void in accordance with the principles applicable to ordinary mortgages and charges, the instrument may give debenture-holders a collateral advantage to continue after redemption, provided that it is not (a) unfair or unconscionable, or (b) in the nature of a penalty, or (c) inconsistent with or repugnant to the contractual or equitable right to redeem

**Cuban Land Co.** [1921] 2 Ch. 147. A debenture instrument provided that debenture-holders should share in any surplus assets on a winding up. The company realised its principal assets, redeemed the debentures and then went into liquidation. *HEJD*, the debenture-holders were entitled to a share of surplus assets notwithstanding the redemption.

But in *Rainbow Syndicate* [1916] W.N. 178, where a clause in a debenture instrument provided that holders should receive a 100 per cent. bonus out of profits to be charged on the security after the principal had been repaid, this was held to be void as a clog on the equity of redemption. The distinction between the two cases is not apparent.

### § 6.—Priority among Debenture-holders.

In general, where a company issues a number of single debentures or a number of series of debentures, the debentures rank in the order of time in which they are issued, but as a floating charge leaves the company at liberty to dispose of its assets, this general rule must be stated subject to the qualification that a fixed charge takes priority over an existing floating charge (*Wheatley v. Silkstone Coal Co.* [1885] 29 C.D. 715).

For this reason, it is customary to insert in debentures secured by a floating charge a clause providing that the

company is not to have power to create a subsequent charge ranking in priority to, or *pari passu* with, the existing debentures. But even where such a clause is inserted, the subsequent fixed charge will take priority if the holder of the debenture issued subsequently can prove either (a) that he was not aware of the existence of the floating charge, or (b) that although he knew of the existence of the floating charge, he was not aware of the restrictive clause contained therein (*English and Scottish Trust v. Brunton* [1892] 2 Q.B. 700). The mere statutory registration of a charge whilst implying knowledge of the creation and existence of the charge is not *prima facie* evidence of the contents of the charge and of any restrictive clauses contained therein.

Where debentures are issued in a series, it is usual to provide that they shall rank *pari passu* for repayment, but if this provision is not made, they are payable in the order of time in which they are issued, or in numerical order if they are issued on the same day (*Gartside v. Silkstone Co.* [1882] 21 Ch. D. 762).

A floating charge over the whole of a company's assets is postponed to the lien enjoyed by an unpaid vendor of property subsequently purchased by the company (*Willson v. Kelland* [1910] 2 Ch. 306), and to a subsequent equitable mortgagee who obtains possession of title deeds without notice of the charge (*Castell and Brown Ltd.* [1898] 1 Ch. 315). But it has priority over a judgment creditor and a landlord, unless the assets are sold under an execution or a distraint before crystallisation takes place (*Evans v. Rival Granite Quarries Ltd.* [1910] 2 K B. 987).

A subsequent floating charge does not take priority over prior floating charges, and a clause in a debenture secured by a floating charge authorising the company to create "mortgages" ranking in priority does not enable the company to create a prior floating charge (*Benjamin Cope & Sons Ltd.* [1914] 1 Ch. 800). But a clause permitting the creation of a "mortgage or charge" may do so (*Automatic Bottle Makers Ltd.* [1926] Ch. 412).

Where the holder of debentures which form part of a series ranking *pari passu* among themselves, is indebted to the company, he cannot set-off the amount owed by him against the amount due under his debenture (*Brown & Gregory Ltd.* [1904] 1 Ch. 627).

The registration of a debenture constitutes constructive notice of the existence of any charge created thereby, but it is not notice of the covenants in the debenture (*Earle v. Hemsworth Rural District Council* [1928] 140 L.T. 69).

### § 7.—Debentures payable to Registered Holder.

Where debentures are made payable to a registered holder, the terms thereof include provisions for the keeping of a register of debentures by the company. In this register the names, addresses and descriptions of the debenture-holders are entered, and in accordance with the terms of the instrument, only a registered holder or his personal representatives may enforce the benefits conferred by the instrument.

The procedure involved upon a transfer of debentures payable to a registered holder is similar to that involved upon a transfer of shares.

A debenture, being a chose in action, is *prima facie* assignable subject to equities only.

**Athenaeum Life Assurance Society v. Pooley** [1859] 3 De G. & J. 294. Debentures issued to X as consideration for property sold by him to the company were transferred by X to Y, who in turn transferred them to Z. It transpired that X was guilty of fraud and bribery in connection with the issue of the debentures, and it was HELD that Z's title was subject to the company's right to damages.

For this reason, it is usual to insert in the debenture a clause providing that the principal and interest payable under the debentures shall be paid without regard to any equities between the company and any holder of the debentures.

Similarly, it is customary to provide that the company shall not be obliged to enter in the register of debentures any notice of a trust or equitable interest to which the debentures are subject; but a clause of this nature, although enabling the company to disregard equitable interests, does not compel it to do so (*Palmer's Decorating Co.* [1904] 2 Ch. 743).

### § 8.—Debentures Payable to Bearer.

These are so worded that they are transferable by delivery and free from equities, wherefore debentures payable to bearer are negotiable instruments (*Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q.B. 658).

The payment of interest is provided for by the attachment of coupons entitling the bearer thereof to payment.

### § 9.—Registration of Mortgages and Charges.

The Act does not insist upon the registration of debentures as such, but mortgages and charges upon the company's property must be registered in accordance with the following regulations:—

- (1) Every limited company must keep at its registered office a register of charges, and must enter therein all charges specifically affecting property of the company, and all floating charges on the undertaking or any property of the company, giving in each case a short description of the property charged, the amount of the charge, and, except in the case of securities to bearer, the names of the persons entitled thereto (S. 88 (1)).

If any director, manager, or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding fifty pounds (S. 88 (2)).

A copy of every instrument which creates a charge requiring registration must be kept at the company's registered office (S. 87). These copies and the register kept by the company may be inspected by (a) any creditor or member free of charge, and (b) by any other person on payment of a prescribed fee not exceeding 1s. (S. 89).

(2) In addition, the following charges must be registered with the registrar of companies:—

- |  |   |   |
|--|---|---|
| <ol style="list-style-type: none"> <li>(a) a charge for the purpose of securing any issue of debentures;</li> <li>(b) a charge on uncalled share capital of the company;</li> <li>(c) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;</li> <li>(d) a charge on land, wherever situate, or any interest therein;</li> <li>(e) a charge on book debts of the company;</li> <li>(f) a floating charge on the undertaking or property of the company;</li> </ol> | } | created<br>after<br>1st<br>July,<br>1908. |
|--|---|---|

- |   |   |   |
|---|---|---|
| <ul style="list-style-type: none"> <li>(g) a charge on calls made but not paid;</li> <li>(h) a charge on a ship or any share in a ship;</li> <li>(i) a charge on goodwill, on a patent or a licence under a patent, on a trademark or on a copyright or a licence under a copyright (S. 79).</li> </ul> | } | created<br>after<br>1st<br>November,<br>1929. |
|---|---|---|

An absolute equitable assignment of part of a book debt which is to fall due in the future is not a "charge" within the meaning of S. 79, for that word in the section denotes only security documents, i.e. it connotes hypothecation (*Ashby Warner & Co. v. Simmons* [1937] C.A.).

It is the duty of a company to send to the Registrar the particulars of charges requiring registration under the last foregoing section, but registration of any such charge may be effected on the application of any person interested therein, and where registration is effected on the application of some person other than the company, that person is entitled to recover from the company the amount of any fees properly paid by him to the Registrar on the registration (S. 80 (1), (2)).

If any company makes default in sending to the Registrar for registration the particulars of any charge requiring registration, then, unless the registration has been effected on the application of some other person, the company and every officer of the company who is in default shall be liable to a default fine of fifty pounds (S. 80 (3)).

Where a company registered in England acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the Registrar of companies for registration within twenty-one days after the date on which the acquisition is completed; provided that, if the property is situate *and* the charge was created outside Great Britain, twenty-one days after the date on which the copy of the instrument could in due course of post, and if dispatched with due diligence, have been received in the United Kingdom, shall be substituted for twenty-one days

after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the Registrar (S. 81 (1)).

If default is made in complying with this section, the company, and every officer of the company who is in default, shall be liable to a default fine of fifty pounds, but non-registration does not make void the charge (S. 81 (2)).

### § 10.—Particulars to be Registered.

The particulars which must be given to the Registrar for registration under S. 79 are as follow:—

(1) In the case of a charge to the benefit of which the holders of a *series of debentures* are entitled:—

- (a) the *total amount secured* by the whole series;
- (b) the *dates of the resolutions* authorising the issue of the series;
- (c) the *date of any covering deed* by which the security is created or defined;
- (d) a *general description* of the property charged;
- (e) the *names of the trustees*, if any.

The deed creating the charge, or if there is no such deed, one of the debentures of the series, must be filed with the above particulars (S. 79 (8)).

(2) In the case of *any other mortgage or charge*:—

- (a) if the charge is created by the company, the *date of its creation* and if the charge was created before the property charged was acquired by the company, the *date of the acquisition* of the property;
- (b) the *amount secured* by the charge;
- (c) *short particulars of the property charged*;
- (d) the *persons entitled to the charge* (S. 82 (1)).

The instrument, if any, by which the charge is created or evidenced must be filed together with these particulars (S. 79 (1)).

In addition, it is provided that where any commission, allowance or discount has been paid or made to any person in consideration of his subscribing or agreeing to subscribe for any debentures, or procuring or agreeing to procure subscriptions, the particulars required to be sent for registration



under this section shall include particulars as to the amount or rate per cent. of the commission, discount, or allowance so paid or made. But omission to do this shall not affect the validity of the debentures issued (S. 79 (9)).

The deposit of any debentures as security for any debt of the company shall not, however, for the purposes of this subsection, be treated as the issue of the debentures at a discount (S. 79 (9)).

Upon receiving the necessary particulars, the registrar issues a certificate, which is conclusive evidence that the requirements of the Act have been complied with (S. 82 (2)). A copy of this certificate must be endorsed on every debenture or debenture stock certificate issued by the company after the creation of the charge (S. 83 (1)).

### § 11.—Effect of Non-registration of Charges.

Failure to insert the necessary particulars of mortgages and charges in the register to be kept by the company does not affect the validity of the charge, but failure to supply the Registrar of companies with the necessary documents and particulars within 21 days after the creation of the charge renders the CHARGE void against the *liquidator* and any *creditor* of the company (S. 79 (1)). But the charge continues to be valid against the company, and the money secured thereby becomes repayable immediately. Nor does non-registration avoid a charge created by a previous owner of property acquired by the company (S. 81 (2)).

If, however, the failure to register within the time prescribed is accidental, or due to inadvertence, or is not of a nature to prejudice the position of creditors or shareholders, or upon other grounds relief is just and equitable, the Court may extend the time allowed for registration. And in similar circumstances the Court may order rectification of misstatements in the register (S. 85).

In the case of a charge over property out of the United Kingdom, the following special concessions are made:—

- (1) If the charge is created out of the United Kingdom, a copy of the instrument which creates or evidences the charge may be filed instead of the instrument itself, and the 21 days within which the registration must be performed may be reckoned from the date upon which

the copy could in due course of post and if despatched with reasonable diligence have been received in the United Kingdom (S. 79 (3)).

- (2) If the charge comprises property in Scotland or Northern Ireland, and registration in either of these countries is necessary to make the charge valid under the laws thereof, it is sufficient to file with the registrar a copy of the instrument by which the charge is created or evidenced, and a certificate stating that the charge has been presented for registration in the country concerned (S. 79 (5)).

### § 12.—Agreements to Issue Debentures.

A person who lends money to a company in consideration of an agreement to issue debentures secured by a charge, acquires immediately an equitable charge over the company's assets (*New Durham Salt Co.* [1891] 7 T.L.R. 18). Such an agreement should, therefore, be registered under S. 79.

A contract to take up and pay for debentures may be enforced by decree of specific performance (S. 76).

### 13.—Right to Inspect Registers.

The register of mortgages and charges kept by the Registrar of companies may be inspected by any person on payment of a fee of not more than one shilling (S. 82 (3)).

Every register of debenture-holders kept by a company may be inspected by a registered holder of debentures, or by any shareholder, except when closed in accordance with the Articles or the terms of the debentures. Subject to such reasonable restrictions as may be imposed by the company in general meeting, the register must be open for inspection for not less than two hours a day, but the Articles, debentures, stock certificates, or trust deed may provide for the closing of the register for not more than 30 days in each year (S. 73 (1)).

This section also provides that:—

- (1) Any registered holder of debentures and any shareholder may require a copy of the list of debenture holders, for which a fee of 6d. per 100 words may be charged (S. 73 (2)).

- (2) A copy of any trust deed must be forwarded to any holder of debentures at his request (S. 73 (3)).

For a copy of a trust deed which has been printed, a fee of not more than 1s. may be charged, and if the deed is not printed, the fee may be 6d. per 100 words copied.

#### § 14.—Re-issue of Redeemed Debentures.

Where a company has redeemed any debentures previously issued, then:—

- (a) unless any provision to the contrary is contained in the Articles or in any contract entered into by the company, or
- (b) unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures shall be cancelled,

the company has, and shall be deemed always to have had, power to re-issue the debentures, either by re-issuing the same debentures, or by issuing other debentures in their place (S. 75 (1)).

For the purposes of stamp duty, re-issued debentures are treated as new debentures, but they are not to be so regarded for the purpose of any provision in the Articles limiting the company's borrowing powers. Failure to re-stamp re-issued debentures will not, however, prevent a holder from using the debentures as evidence in any proceedings to enforce his security if:—

- (a) the debentures appear to be duly stamped; and
- (b) the holder has no notice of the true state of affairs (S. 75 (5)).

The persons to whom redeemed debentures are re-issued have the priorities which the holders thereof enjoyed before the redemption (S. 75 (2)). It should be observed, however, that if debentures are deposited, e.g. with a bank, to secure advances made from time to time, they are not deemed to be redeemed by reason only of the fact that the company's account ceases to be in debit whilst the debentures remain so deposited (S. 75 (4)).

Particulars of redeemed debentures which the company has power to re-issue must be included in the balance sheet (S. 75 (3)).

Upon the redemption of a debenture secured by a charge, the Registrar may, on receiving satisfactory evidence of the redemption, enter a memorandum of satisfaction on the register. A copy of this entry may be obtained by the company on request (S. 84).

### § 15.—Nature and Effect of Trust Deeds.

Where debentures are issued to secure advances of any magnitude, it is customary to draw up a trust deed appointing trustees for the debenture-holders, and vesting in them the title of such property as is the subject of a fixed charge. In such cases, the trustees are virtually mortgagees of the property charged, the debenture-holders having shares in the common security. The deed usually provides for the steps which are to be taken when the security becomes enforceable, and authorises the trustees to appoint receivers in certain circumstances, providing also for the powers, rights and remuneration of the trustees. Thus, the trustees may have power to summon meetings of the debenture-holders to be held in accordance with the terms of the deed.

It is usual to provide that the trustee shall be entitled to remuneration "during the continuance of the security," but whether such a clause enables the trustees to claim payment after the appointment of a receiver has not yet been determined. Much will depend upon the wording of the clause (*British Consolidated Oil Corporation* [1919] 2 Ch. 81). Unless otherwise provided, the trustees' right to remuneration ranks after the claims of the debenture-holders (*Hodgson v. Accles* [1902] W.N. 164).

### § 16.—Remedies of Debenture-holders.

The remedies enjoyed by debenture-holders depend largely upon the terms of the debentures. Thus, if no charge is created by the debentures, the holders have no remedies in addition to those enjoyed by other creditors, i.e. they can only sue the company or petition for a winding-up order.

The right of action for the repayment of the moneys advanced is also enjoyed by the holders of debentures secured by a charge, but in this case, the plaintiff, on behalf of himself and his co-debenture-holders, asks the Court for the appointment of a receiver and an order for the sale of the company's assets.

But it is commonly provided by the instrument creating the charge, that at any time after the principal moneys secured become due, the registered holder, who may be the debenture-holder himself or the trustees appointed under the trust deed, may himself appoint a receiver, in which case no application to the Court is necessary. The instrument will, in such a case, define the powers of the receiver, which usually include power to take possession of and sell the property charged, and, where necessary, to carry on the business.

Power to sell assets or to appoint a receiver must be given expressly by the instrument, for, except where a legal mortgage of real estate is created, it cannot be implied (*Blaker v. Herts. & Essex Waterworks* [1889] 41 Ch. D. 399).

Notice of the appointment of a receiver or manager, whether the appointment is made by the Court or under powers given by the debentures, must be given to the registrar of companies within 7 days (S. 86 (1)); and a similar notice is necessary when a receiver appointed under powers given by the debentures ceases to act (S. 86 (2)). Moreover, after a receiver or manager has been appointed, every invoice, order for goods or business letter issued by or on behalf of the company or the receiver or manager, or a liquidator, being a document in which the name of the company appears, must contain a statement that a receiver has been appointed (S. 308 (1)).

Whether or not the debentures give powers to appoint a receiver, application to the Court for an appointment may be made, and this is sometimes done notwithstanding the powers given by the instrument, as, since the receiver appointed by the Court is an officer of the Court, no proceedings can be taken against the assets in his hands except with leave of the Court.

**Re Metropolitan Amalgamated Estates Ltd.** [1912] 2 Ch. 497. A company having issued debentures secured by a charge upon its assets, some of which were subject to prior mortgages, a receiver was appointed by the mortgagee. The assets included sundry leasehold interests inhabited by sub-tenants, and before the mortgagee's receiver had notified these tenants of his appointment, the debenture-holders obtained the appointment of a receiver by the Court.

It was HELD that until the receiver for the mortgagee obtained the leave of the Court to receive the rents of the leasehold properties, these rents were payable to the receiver for the debenture-holders.

The Court may, moreover, appoint a receiver in circumstances which do not justify the exercise of the powers given to the

debenture-holders. Thus, it is usual to provide in the debentures that a receiver shall not be appointed unless the principal moneys secured have become due in accordance with the terms of the instrument, but the Court will appoint a receiver if the assets are in jeopardy, notwithstanding that the principal moneys have not become due. Thus, receivers have been appointed by the Court on the ground that:—

1. The company is about to go into liquidation (*Victoria Steamboats Co.* [1897] 1 Ch. 158).
2. The company is disposing of its assets to the imperilment of the debenture-holders' security (*Hubbuck v. Helmes* [1887] 56 L.T. 232).
3. The company contemplates distributing reserve funds, which are its only assets (*Tilt Cove Copper Co.* [1913] 2 Ch. 588).

The Court may appoint a receiver after one has been appointed by the debenture-holders ("*Slogger*" *Automatic Co.* [1915] 1 Ch. 478).

### § 17.—Who may be Appointed Receiver.

Apart from the fact that an application for the appointment of a receiver must be supported by an affidavit of fitness if a named person is suggested for the position, the law has placed restrictions upon the persons who may be appointed. Thus, the Court will not appoint the petitioner in a debenture-holders' action, unless all other holders consent; nor will a director of the company be appointed (*Carshalton Park Estate, Ltd.* [1908] 2 Ch. D. 66); and by S. 306 a body corporate cannot be appointed.

If an application for a receiver is simultaneous with the application for the appointment of a liquidator, it is the usual practice of the Court to appoint one person to be liquidator and receiver, and a similar practice is followed where the application for the appointment of a receiver is subsequent to the appointment of the liquidator, unless the circumstances show such appointment to be undesirable.

The liquidation of the company and the appointment of a liquidator do not displace the receiver, but where there is uncalled capital to be got in, the Court will usually remove the receiver and appoint the liquidator to act as receiver also.

The right of substitution, however, will only be exercised when the receiver is appointed by the Court, and not where he is appointed by virtue of the terms of the security. Finally, by virtue of S. 307, the Court has power to appoint the Official Receiver, when an application is made for the appointment of a receiver.

### § 18.—Status of the Receiver.

For various reasons, it is important to define with extreme care the legal status of a receiver appointed by or for debenture-holders.

(1) A receiver appointed by the Court is an officer of the Court, and is neither an agent of the company nor of the debenture-holders (*Boehm v. Goodall* [1911] 1 Ch. 155). In general, the appointment does not become effective until security has been given by the receiver, but in urgent cases, the Court may authorise the receiver to act immediately, provided that security is given within a specified time. The amount at which the security is fixed is usually double the yearly value of the estate to be collected.

Unless the terms of the debenture or trust deed require it (and this is exceptional) the receiver appointed out of Court need not give security.

As an officer of the Court, the receiver is personally liable for all debts incurred by him in the course of his duties, unless the express terms of the contract exclude such liability, but in respect of all liabilities properly incurred, there is a right to be indemnified out of the assets (*Moss S.S. Co. v. Whinney* [1912] A.C. 270). And this right of indemnity ranks, together with the expenses of the receivership, in priority to all other claims against the assets (*London United Breweries* [1907] 2 Ch. 511).

Since a receiver appointed by the Court is an officer of the Court, it is a contempt of Court to interfere with property in his possession (*Metropolitan Amalgamated Estates Ltd., supra*).

(2) Where a debenture empowers the debenture-holders to appoint a receiver, the instrument usually provides that the receiver so appointed shall be the agent of the company, and such a provision may even be implied where the powers conferred upon the receiver are those conferred upon a receiver for a mortgagee by the Law of Property Act, 1925 (*Calley v.*

*Parsons* [1923] 2 Ch. 512). But if the powers of the receiver are in excess of those given by the Law of Property Act, 1925, and the debenture does not state that he is to be the agent of the company, it may be inferred that he is the agent of the debenture-holders (*Deyes v. Wood* [1911] 1 K.B. 806).

Being an agent, a receiver appointed under powers conferred upon the debenture-holders by the instrument is not personally liable for debts contracted by him within the scope of his authority, but his right to bind the company terminates upon the commencement of a liquidation.

**Thomas v. Todd** [1926] 2 K.B. 511. The plaintiff had a contract with a limited company. While the contract was running, the defendant was appointed receiver of the company by a debenture-holder, the debenture deed providing that the receiver might carry on the company's business, and was to be deemed the agent of the company. An agreement was then made by the plaintiff and defendant that a week-to-week engagement should be substituted for the existing contract. Afterwards the company went into voluntary liquidation, and by agreement the plaintiff's engagement was continued for a week thereafter. It was HELD that the right of the receiver to bind the company terminated on the commencement of the voluntary liquidation, and the defendant was personally liable on the agreement.

A receiver appointed by the Court cannot without the Court's sanction employ an agent to find a purchaser of the property over which he is receiver and to promise to pay his remuneration, but if no sanction has been obtained, the Court may award such sum for commission as it thinks just (*In re National Flying Services Ltd.* [1936] Ch. 271).

### § 19.—Receiver and the Company's Contracts.

A receiver without powers of management cannot carry out the company's contracts and his appointment therefore determines all such contracts (*Newdigate Colliery Ltd.* [1912] 1 Ch. 468). Servants of the company are, therefore, entitled to damages for wrongful dismissal, unless, by accepting the receiver's offer of a new contract, they waive the right (*Ex parte Pitt* [1924] 40 Times Rep. 5).

On the other hand, as it is the duty of a receiver and manager to preserve the company's goodwill, he is obliged to perform contracts entered into by the company before his appointment, even if the performance is detrimental to the debenture-holders.



**Re Newdigate Colliery Co.** [1912] 1 Ch. 468. A company entered into a contract to make forward delivery of coal at a fixed price per ton. Before the date of performance arrived, a receiver and manager was appointed. It was then discovered that the coal could be sold more profitably elsewhere. HELD that the receiver could not on that account repudiate the contract.

But if the performance of the contract will not benefit either the company or the debenture-holders, the Court may allow the receiver to repudiate (*Thames Ironworks Ltd.* [1912] W.N. 66). Persons to whom goods are supplied by the receiver can set off against the price debts due to them from the company, at any rate where the goods are supplied under a contract entered into before the receiver's appointment (*Parsons v. Sovereign Bank of Canada* [1913] A.C. 160).

Notwithstanding the foregoing rules, it appears, however, that the appointment of a receiver and manager terminates contracts of service with the company (*Reigate v. Union Manufacturing Co.* [1918] 1 K.B. 592); unless the receiver is the agent of the company ("Kerr on Receivers" at p. 374).

#### § 20.—Borrowing by a Receiver.

In order to carry on the business of the company, a receiver and manager has frequently to borrow money, and where this becomes necessary, leave of the Court should be obtained. In such cases, the Court usually authorises borrowing up to a certain amount, which should on no account be exceeded, and may permit the receiver to create a charge over the assets ranking in priority to the claims of the debenture-holders. Such a charge does not, however, obtain priority over the costs, or the receiver's right of indemnity (*Glasdir Copper Co.* [1906] 1 Ch. 365). But the Court will not give leave to borrow unless it is satisfied that the loan will be to the advantage of the company and the debenture-holders (*Securities Investment Corporation v. Brighton Alhambra* [1893] 68 L.T. 249).

#### § 21.—Property Obtainable by Receiver.

The property which is subject to the receiver on his appointment depends upon the nature and extent of the charge under which he is appointed. As previously stated, the terms of the charge are usually worded, especially in the case of a debenture trust deed, to create a charge over the fixed and floating assets

of the company, a fixed legal charge on all the real property, plant and machinery, and a floating charge over all the other assets and property of the company.

Where the charge covers all the property and assets of a company, including the uncalled capital, the receiver becomes entitled to all the books and documents relative to the property and assets of the company. But if the company goes into liquidation, the receiver must surrender to the liquidator all such books as are necessary to the management of the business of the company, and which are not necessary to establish title of the receiver to the property.

The uncalled capital, excepting that portion which has become reserve capital, may also pass under the charge. In order that uncalled capital may be subjected to the charge, the Memorandum or Articles must permit it, and the words of the charge must be sufficient to cover such capital. It need not be expressly specified that uncalled capital may be charged, and it is sufficient if the Memorandum gives power to charge "the property and rights" (*Howard v. Patent Ivory Co.* [1888] 38 Ch. D. 156); or "assets," or to raise money "in various modes" or "on any security of the company" (*Newton v. Debenture Holders of Anglo-Australian Co.* [1895] A.C. 244); but it will be insufficient if the Memorandum merely gives power to charge "the property" (*Irvine v. Union Bank of Australia* [1877] 2 A.C. 366); or "the property both present and future" (*Russian Spratts Ltd.* [1898] 2 Ch. D. 149).

Where the uncalled capital is included in the security, and the company is not in liquidation, the receiver should apply to the Court for authority to make a call and recover the amount, and, if necessary, to sue for the call in the name of the company. Where, however, the company is in liquidation, the receiver should apply to the Court to direct the liquidator to make the call, and for authority to bring action to enforce the call in the name of the liquidator. In such cases, it is usual that the liquidator be also appointed receiver.

## § 22.—Remuneration of Receiver.

Unless there is an express or implied undertaking to the contrary, a receiver has a right to remuneration similar to that of any other agent. The principal of the receiver is the person responsible for the payment of the remuneration, but where

the receiver has been appointed by the *Court*, "there is no principal to be liable," and the receiver may retain his remuneration from the assets which he collects. The remuneration allowed may be either a fixed gross sum or a percentage upon his receipts as evidenced in his accounts.

A receiver appointed under the Law of Property Act, 1925, is entitled to retain out of the assets, in payment of remuneration, costs and expenses, such commission not exceeding 5% on monies received as is specified in the terms of his appointment, or at a rate of 5% if no rate is so specified.

The Court, on the application of the liquidator, may fix the amount of remuneration of a receiver or manager of the property of the company where he is appointed under powers contained in any instrument, and the Court from time to time may vary or amend such remuneration on the application of the liquidator, or receiver or manager (S. 309).

There is no fixed scale for the remuneration of a receiver and manager, who may be paid a percentage (usually 5%) on his receipts, or by a lump sum, or on a time basis.

### § 23.—Accounts of Receivers and Managers.

Every receiver or manager of the property of a company who has been appointed under the powers contained in any instrument, shall, within one month, or such longer period as the Registrar of companies may allow, after the expiration of the period of six months from the date of his appointment, and of every subsequent period of six months, and within one month after he ceases to act as receiver or manager, file with the registrar of companies an abstract in the prescribed form showing his receipts and his payments during that period of six months, or, where he ceases to act, during the period from the end of the period to which the last preceding abstract related, up to the date of his so ceasing, and the aggregate amount of his receipts and of his payments during all preceding periods since his appointment (S. 310 (1)).

In the event of a failure to comply with these provisions, or to make the returns or to give the notices required by the Act, or to pay over to the liquidator the amount payable to him, the Court may, upon the application of any member or creditor or the liquidator, direct the default to be made good, and charge the receiver with the costs of the application (S. 311).

The above statutory provisions apply where the receiver is appointed out of Court, but a receiver appointed by the Court has an accounting obligation to the Court. The receiver must pass his accounts before the judge in Chambers from time to time, as fixed by the Master in Chambers, and pay balances into Court until the estate is completely realised and his discharge has been obtained.

The accounts must be in such form as the Rules of Court prescribe, and verified by affidavit, and copies must be sent to all parties entitled to be present when the accounts are being submitted for passing.

If the accounts are passed the Master will issue a certificate therefor and direct payment of balances to be made to the Court within a specified time.

## ABSTRACT OF CHAPTER IX

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### MEETINGS

- § 1.—GENERAL PRINCIPLES GOVERNING MEETINGS.
- § 2.—CONSTITUTION OF A MEETING.
- § 3.—PROCEDURE AT MEETINGS.
- § 4.—RESOLUTIONS.
- § 5.—REGISTRATION OF RESOLUTIONS.
- § 6.—MINUTES OF MEETINGS.
- § 7.—STATUTORY MEETINGS AND STATUTORY REPORTS — PUBLIC COMPANIES.
- § 8.—ANNUAL MEETINGS.
- § 9.—EXTRAORDINARY MEETINGS.
- § 10.—MEETINGS CALLED OR CONDUCTED UNDER AN ORDER OF COURT.

## CHAPTER IX

# MEETINGS

### § 1.—General Principles Governing Meetings.

Although the management of a company's business is necessarily left to the discretion of the directors, the ultimate control of the actions of the Board is vested in the members, and from time to time the members must therefore be called together to ratify, or express their disapproval of, the directors' past conduct, and to consider their plans for the future. Thus, shortly after the formation of a public company, a *Statutory Meeting* must be held, while each year an *Annual General Meeting* must be summoned to consider the report and accounts of the directors. In addition, occasions may arise when it is necessary to consult the members on some urgent and unusual matter which justifies the summoning of an *Extraordinary Meeting*.

Subject to the qualifications which are mentioned hereafter, the wishes of a company can be expressed only by resolutions of a majority of the members present and voting at a general meeting which has been properly convened in accordance with the provisions of the Articles and the Act. A resolution passed at a meeting which has not been properly convened is in general ineffective; but, under the rule in *Foss v. Harbottle* [1842] 2 Hare 461, the Court will not interfere if the irregularity is of a purely domestic nature, and it is capable of being confirmed by the majority. But a majority cannot under this rule:—

- (1) Sanction an act which is *ultra vires* the company (*Burland v. Earle* [1902] A.C. 83).
- (2) Commit a fraud upon the minority (*Menier v. Hooper's Telegraph Works* [1874] 9 Ch. 590).
- (3) Take advantage of a Special Resolution passed by a trick (*Baillie v. Oriental Telephone Co.* [1915] 1 Ch 503).
- (4) Pass a resolution inconsistent with the Articles (*Quin & Axtens Ltd. v. Salmon* [1909] A.C. 443).

It was held in *Perrott and Perrott Ltd. v. Stephenson* [1934] Ch. 171, that the Common Law rule of corporation law, that

“where no special provision is made by the constitution of a corporation, the whole are bound by the acts, not only of the major part, but by the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole body or not,” has no application to companies under the Companies Acts.

## § 2.—Constitution of a Meeting.

1. A meeting cannot be held without a CHAIRMAN, but unless the Articles otherwise provide, any member elected by the members present may be a chairman (S. 115 (1)).

2. In general, two persons at least must be present to constitute a meeting, but:—

- (a) The Articles may specify some other number as a quorum;
- (b) Table A requires three members to be *personally* present;
- (c) If the Articles do not otherwise provide and Table A is expressly excluded:—
  - (i) in the case of a *public* company, three members must be personally present; and
  - (ii) in the case of a *private* company, two members must be personally present (S. 115 (1)).

A member represented by PROXY is not “personally present” for the purpose of a quorum (*Ernest v. Loma Gold Mines Ltd.* [1897] 1 Ch. 1); but the representative of a corporation which holds shares in the company whose meeting is concerned may form one of a quorum (S. 116 (1) (a)).

If a meeting is summoned, but no QUORUM is available, no business can be conducted, unless the Articles provide for such a contingency. In this respect, the old and the new Table A provide that if no quorum is present within half an hour of the time appointed for a meeting, the meeting stands adjourned to the same day and hour of the following week, and if no quorum is present within half an hour from the time appointed for the adjourned meeting, the members present shall be a quorum.

3. A meeting may be rendered invalid if proper NOTICE is not given to all persons who are entitled to receive the notice, and this depends to a great extent upon the Articles. But if the Articles are silent and Table A is excluded, seven days

notice in writing must be given to *all members* (S. 115 (1)) and others entitled to attend. It is usual, however, for the Articles to provide that holders of shares upon which there are calls in arrear shall not be entitled to attend or vote at meetings, and this exclusion is sometimes extended to preference shareholders. In such cases, notice need not be given to the excluded persons (*Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656).

The manner in which notice is to be served upon the persons entitled thereto is also usually prescribed by the Articles, but, in this case, if the Articles are silent, the provisions of Table A must be observed *even if the Table is expressly excluded by the Articles* (S. 115 (1)).

The notice must give:—

1. The place, day and hour of the meeting (all of which must be reasonably convenient to the general body of shareholders); and
2. Particulars of any SPECIAL BUSINESS to be transacted at the meeting.

What is to be regarded as special business depends primarily upon the Articles, but it is usual to include under the term (a) all business to be transacted at extraordinary meetings; and (b) in the case of ordinary meetings, all business other than the sanctioning of a dividend, the consideration of the report and accounts, the election of officers and the fixing of the remuneration of the auditors.

The notice must, in general, be issued by authority of the Board of Directors, but if the Articles do not otherwise provide, a meeting may be summoned by (a) two or more members holding not less than one-tenth of the issued share capital, or (b) if the company has no share capital, not less than five per cent. in number of the members (S. 115 (1)).

If, however, all the members were present and none object, they may waive the formalities stated above and hold a valid meeting, notwithstanding that no notice has been given (*Express Engineering Works* [1920] 1 Ch. 466); and may even pass an extraordinary resolution (*Oxied Motor Co.* [1921] 3 K.B. 82).

It may be added that notice of a meeting adjourned to a fixed date need not be given, unless the Articles so require



(*Kerr v. Wilkie* [1860] 1 L.T. 501); but notice of the holding of a meeting adjourned *sine die* must be given (*Wills v. Murray* [1850] 4 Ex. 843).

### § 3.—Procedure at Meetings.

The procedure at a general meeting is governed primarily by the common law which may, however, be modified by the company's Articles. Thus, although at common law each member has one vote, the Articles usually provide that when a poll is taken, the voting shall be by value, i.e. that the weight of a member's vote shall depend upon the number of shares which he holds, and by S. 115 (1), if the Articles make *no provision to the contrary*, every member has one vote in respect of each share or each £10 of stock held by him. Articles often provide, however, that no votes shall be cast by holders of shares with calls in arrear, while preference shareholders are also occasionally excluded, in which case it seems that they are not entitled to receive notice of a meeting (*Mackenzie & Co.* [1916] 2 Ch. 450).

Where the voting is by show of hands, only a shareholder or a representative of a corporation which is a shareholder may vote, and proxies may not be used, each member having one vote only; but upon a poll being taken, the voting may be by value and proxies may be used if the Articles so provide.

The regulations for demanding a poll are as follows:—

- (1) The provisions of the Articles are paramount, but in the case of an extraordinary or special resolution, not more than five members can be required by the Articles (S. 117 (4)).
- (2) If Table A is applicable, then:—
  - (a) in the case of a company registered before 1st November, 1929, any three members may demand a poll (Clause 56, Table A, Companies (Consolidation) Act, 1908);
  - (b) in the case of a company registered after 1st November, 1929, a poll may be demanded by at least three members present in person or by proxy entitled to vote, or by one member or two members holding alone or together not less than 15% of the paid-up capital (Clause 50, Table A, Companies Act, 1929).

Under the 1929 Table A, therefore, a proxy may join in a demand for a poll, notwithstanding that he is not himself a member.

The Act does not establish a statutory right to vote by proxy, but the right is usually given by the Articles, as it is by the old and the new Table A. A proxy must be in writing in the form prescribed by the Articles, and must be stamped. A *special* proxy, i.e. one which authorises a named person to vote for a shareholder at a specified meeting and any adjournment thereof only, must bear a penny stamp, but a *general* proxy, i.e. one which authorises the donee to vote at more than one meeting, requires a ten shilling stamp.

Under Table A to the Companies (Consolidation) Act, 1908, no person can act as a proxy unless he is himself entitled to vote at the meeting or is the representative of a corporation shareholder, but Table A of the Companies Act, 1929, permits persons who are not members to act as proxies, though there seems to be no reason why the Articles should not exclude strangers.

A corporation which holds shares in a company has, however, a STATUTORY RIGHT to appoint any person it thinks fit to act as its representative at a meeting of the company, the appointment being made by resolution of the governing body (S. 116 (1)). The person who is authorised to represent a corporation shareholder has, moreover, more extensive powers than a proxy, for he can act for all purposes as if he himself were a shareholder, e.g. he can vote on a show of hands (S. 116 (2)).

Both the old and the new Table A require the instrument appointing a proxy, and the authority (if any) under which it was signed, to be deposited at the company's registered office not less than 48 hours before the holding of the meeting at which it is to be used. Failure to comply with this requirement renders the proxy invalid, and in *McLaren v. Thomson* [1917] 2 Ch. 261, it was held that proxies deposited after the date of a meeting which had been adjourned could not be used at the adjourned meeting, unless the Articles so provided. A provision permitting the use of proxies in such circumstances is included in Clause 60 of Table A of the Companies Act, 1929. But if the Articles, while permitting the use of proxies, do not require them to be lodged with the company before the meeting, the donee may vote even if he is unable to produce the proxy

instrument at the meeting (*English, Scottish and Australian Bank* [1893] 3 Ch. 385).

But it is important to observe that where a poll is directed to be taken at a later date, this does not constitute an adjournment within the meaning of the above rule (*Shaw v. Tati Concessions* [1913] 1 Ch. 292).

A shareholder who attends a meeting in person can revoke a proxy given by him before the meeting notwithstanding a provision to the contrary in the Articles (*Cousins v. International Brick Co.* [1931] W.N. 30).

#### § 4.—Resolutions.

Unless by statute or by the company's Articles the *contrary* is provided, a measure may be carried by a simple majority of the persons voting in person or, where proxies are allowed, by proxy, at a general meeting, i.e. by ORDINARY RESOLUTION.

But, in certain circumstances, where matters of greater importance are involved, involving special notice and/or more deliberate consideration, Extraordinary or Special Resolutions are, either by the Statute itself or by the company's Articles, made necessary.

There is no definition of an Ordinary Resolution in the Act, but S. 117 gives definitions of both Extraordinary and Special Resolutions, and these are of great importance:—

“A resolution shall be an EXTRAORDINARY RESOLUTION when it has been passed by a majority of not less than three-fourths of such members as, being entitled so to do, VOTE in person or, where proxies are allowed, by proxy, at a general meeting of which notice specifying the intention to propose the resolution as an Extraordinary Resolution has been duly given” (ss. 1).

“A resolution shall be a SPECIAL RESOLUTION when it has been passed by such a majority as is required for the passing of an Extraordinary Resolution and at a general meeting of which not less than 21 days notice, specifying the intention to propose the resolution as a Special Resolution, has been duly given ” (ss. 2).

The 21 days notice required by S. 117 is 21 *clear* days, i.e. exclusive of the day of service and of the day on which the meeting is to be held. A company cannot curtail by its Articles

the length of notice required by the section (*In re Hector Whaling Ltd.* [1936] Ch. 208).

[A Special Resolution differs from an Extraordinary Resolution only in that 21 days notice describing the proposed resolution as a Special Resolution must be given, whereas, subject to the Articles, 7 days notice of an Extraordinary Resolution is sufficient.]

If all the members entitled to attend and vote at a meeting so agree, a resolution may be proposed and passed as a Special Resolution at a meeting of which less than 21 days notice has been given (S. 117 (2)).

The Articles may specify the circumstances in which Extraordinary or Special Resolutions must be obtained, but even where the Articles are silent, the following provisions of the Companies Act, 1929, must be observed:—

(1) *Special Resolutions* are required to:—

- (a) Alter the objects clause of the Memorandum (S. 5).
- (b) Alter the Articles (S. 10).
- (c) Alter the company's name (S. 19).
- (d) Create a reserve liability (S. 49).
- (e) Authorise the payment of interest out of capital (S. 54).
- (f) Reduce the share capital (S. 55).
- (g) Appoint inspectors of the company's business (S. 137).
- (h) Make the liability of directors unlimited (S. 147).
- (i) Go into voluntary liquidation, in the majority of cases (S. 225).
- (j) Authorise the assignment of a director's office (S. 151).
- (k) Authorise the sale of the business for shares in another company (S. 234).

(2) *Extraordinary Resolutions* are required to:—

- (a) Go into voluntary liquidation, where the cause is insolvency (S. 225).
- (b) Make a compromise with creditors in a voluntary liquidation (S. 251).
- (c) Dispose of the books in a members' voluntary liquidation (S. 283).

At any meeting at which an Extraordinary Resolution or a Special Resolution is submitted to be passed, a declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution (S. 117 (3)). This section confirms the decision in *Hadleigh Castle Gold Mines* [1900] 2 Ch. 419, where it was held that, in the absence of fraud, the Court cannot enquire whether a resolution has been properly carried, after the chairman has declared the result; but if the declaration shows on its face that the necessary majority has not been obtained, it will be ineffective.

**Graham's Morocco Co.** [1932] S C. 269. At an extraordinary meeting the chairman declared a special resolution carried on a show of hands. No poll was demanded, but in fact unqualified persons had voted for the resolution. HELD, under S 117 (3) of the Act the chairman's declaration was final and conclusive.

### § 5.—Registration of Resolutions and Agreements.

Within 15 days after the passing of certain types of resolutions, a printed copy thereof must be filed for registration, and if Articles have been registered, a copy of every such resolution which is in force for the time being must be annexed to every copy of the Articles issued after the passing of the resolution (S. 118). If no Articles have been registered, a printed copy of all such resolutions must be forwarded to any member at his request, on payment of one shilling or such less sum as the company may direct. The resolutions to which these provisions apply are:—

- (1) Special and Extraordinary Resolutions.
- (2) Resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as Special Resolutions or as Extraordinary Resolutions.
- (3) Resolutions or agreements which have been agreed to by all the members of some class of shareholders, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by some particular majority or otherwise in some particular

manner, and all resolutions of agreements which effectively bind all the members of any class of shareholders, though not agreed to by all those members.

- (4) Resolutions requiring a company to be wound up voluntarily passed under S. 225 (1) (a).

A resolution passed after the commencement of the Companies Act, 1929, at an adjourned meeting of a company or a class of shareholders or the directors of a company, shall for all purposes be deemed to have been passed on the date on which it was in fact passed (S. 119); irrespective of the date for which the meeting was called.

### § 6.—Minutes of Meetings.

Every company must keep Minute Books in which must be entered particulars of the proceedings at general meetings, and at meetings of the company's directors and managers. These minutes, if purporting to be signed either by the chairman of the meeting reported, or by the chairman of the next succeeding meeting, are *prima facie* evidence of the proceedings, but express evidence may be given to prove that they are inaccurate (*Fireproof Doors Ltd.* [1916] 2 Ch. 142). A matter not recorded in the minutes is presumed not to have been brought before the meeting; but evidence may be called to disprove the presumption (*Fireproof Doors Ltd. supra*). Confirmation of the accuracy of the minutes at a succeeding meeting, though customary, is not essential, and does not materially alter their effect (*The Queen v. Mayor of York* [1853] 1 E. & B. 594). Minutes duly made and signed in accordance with the foregoing rules are, moreover, *prima facie* evidence that the meeting was properly held, convened and conducted (S. 120).

The Minute Books containing the minutes of a general meeting held after 1st November, 1929, must be kept at the Registered Office, and must be kept open for inspection by any member without charge during business hours, subject to such reasonable restrictions as may be imposed by the Articles or in general meeting, but so that at least two hours in each day be allowed for inspection (S. 121 (1)). In addition, any member is entitled to be furnished within 7 days after his request with a copy of such minutes, at a charge of not more than 6d. per 100 words (S. 121 (2)).

It was held in the case *Hearts of Oak Assurance Co. v. Flower & Sons* [1935] 52 T.L.R. 5, that a collection of loose leaves fastened together between two covers is not a book within the meaning of S. 120, Companies Act, 1929, and is not admissible in evidence for the purposes of that section.

### § 7.—Statutory Meetings and Statutory Reports—Public Companies.

A *public* company which has a share capital must hold a Statutory Meeting not less than one month nor more than three months after the date on which it is entitled to commence business (S. 113 (1)). At least 7 days before the date on which the meeting is to be held, the directors must forward to every member of the company, a Statutory Report stating:—

- (a) the total number of SHARES ALLOTTED, distinguishing shares allotted as fully or partly paid up otherwise than in CASH, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the CONSIDERATION for which they have been allotted;
- (b) the total amount of CASH RECEIVED by the company in respect of all the shares allotted, distinguished as aforesaid;
- (c) an ABSTRACT of the RECEIPTS of the company AND of the PAYMENTS made thereout up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company;
- (d) the names, addresses, and descriptions of the DIRECTORS, AUDITORS, if any, MANAGERS, if any, and SECRETARY of the company; and
- (e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification (S. 113 (3)).

This report must be signed by not less than two directors or, where there are less than two directors, by the sole director and the manager, whilst in addition, it must be CERTIFIED

BY THE COMPANY'S AUDITORS (if any) so far as it relates to shares allotted, to cash received in respect of such shares, and to receipts and payments on capital account (S. 113 (4)). A copy of the report must also be filed with the Registrar of Companies (S. 113 (5)).

At the Statutory Meeting, a list showing the names, descriptions and addresses of the members and the number of shares held by them must be produced for inspection, and those present may discuss any matter relating to the formation of the company or arising out of the Statutory Report, but no resolution may be passed unless notice has been given in accordance with the requirements of the Articles (S. 113 (7)). The meeting may, however, adjourn from time to time, and at an adjourned meeting a resolution of which notice is given after the date of the original meeting, may be passed (S. 113 (8)).

A private company is not required to hold a Statutory Meeting, or to issue a Statutory Report (S. 113 (10)).

Any variation of the terms of a contract mentioned in the prospectus or statement in lieu of prospectus must, if made before the Statutory Meeting, be approved by the meeting (S. 36).

### § 8.—Annual Meetings.

Every company must hold a General Meeting at least once in every calendar year, and not more than fifteen months after the holding of the last preceding General Meeting (S. 112 (1)). At this meeting it is usual to consider the directors' report and accounts, to sanction a dividend, and to re-elect retiring directors and auditors, but these matters are governed wholly by the company's Articles. If a default is made in the holding of the Annual General Meeting, the company and every director and manager who is knowingly a party to the default is liable to a fine of not more than £50, and upon the application of any member, the Court may direct the meeting to be called (*ibid.*).

In fixing the dates of Ordinary General Meetings at which accounts are to be submitted for the period immediately following incorporation, regard must be had to S. 123 [see Ch. XI, § 2].

### § 9.—Extraordinary Meetings.

At any time the directors *may* convene Extraordinary Meetings of the company to consider matters of exceptional



importance, and such meetings *must* be summoned upon a requisition made by:—

- (a) members holding not less than ONE-TENTH of such of the PAID-UP CAPITAL as carries the RIGHT OF VOTING at general meetings; or
- (b) in the case of the company with NO SHARE CAPITAL, members representing not less than ONE-TENTH of the TOTAL VOTING RIGHTS of all the members with a right to vote at general meetings (S. 114 (1)).

The requisition must state the objects of the meeting, and must be signed by the requisitionists, and be deposited at the Registered Office (S. 114 (2)). If within 21 days after the date of the deposit of the requisition the directors do not proceed to convene a meeting, the requisitionists or any of them representing more than one-half of the total voting rights of all of them, may themselves convene a meeting, provided that it is held within 3 months after the date of the deposit of the requisition (S. 114 (3)). A meeting convened by the requisitionists must be convened, as far as possible, in the same manner in which meetings are convened by the directors, and the expenses of the convention may be recovered from the company, which is entitled to recoup itself out of the remuneration of the defaulting directors (S. 114 (5)).

### § 10.—Meetings Called or Conducted under an Order of Court.

By S. 115 (2), it is provided that IF, *for any reason*, it is IMPRACTICABLE TO CALL a meeting in any manner in which meetings may be called, OR TO CONDUCT A MEETING IN THE MANNER PRESCRIBED by the Articles or the Act, the COURT MAY, either of its own motion or on the application of any director or of any member who would be entitled to vote at the meeting, ORDER A MEETING TO BE CALLED, HELD AND CONDUCTED IN SUCH MANNER AS THE COURT THINKS FIT. An order made under this section may give such directions as the Court thinks expedient, and it is expressly provided that any meeting held in accordance with the order shall be deemed for all purposes to be a meeting of the company duly called, held and conducted.

## ABSTRACT OF CHAPTER X

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### THE OFFICERS OF A COMPANY

- § 1.—NECESSITY FOR DIRECTORS.
- § 2.—APPOINTMENT OF DIRECTORS.
- § 3.—QUALIFICATION OF DIRECTORS.
- § 4.—EFFECT OF IRREGULAR APPOINTMENT OF DIRECTORS.
- § 5.—NUMBER AND ROTATION OF DIRECTORS.
- § 6.—REMUNERATION OF DIRECTORS.
- § 7.—VACATION OF OFFICE BY DIRECTORS.
- § 8.—LEGAL POSITION OF DIRECTORS.
- § 9.—LIABILITY OF DIRECTORS.
- § 10.—REMEDIES AGAINST DIRECTORS.
- § 11.—PROCEEDINGS OF DIRECTORS.
- § 12.—APPOINTMENT OF SECRETARY.
- § 13.—POWERS AND DUTIES OF THE SECRETARY.
- § 14.—COMPANY'S CONTRACTS.
- § 15.—THE COMMON SEAL.
- § 16.—OFFICIAL SEAL FOR USE ABROAD.



## CHAPTER X

# THE OFFICERS OF A COMPANY

### § 1.—Necessity for Directors.

The law has vested a company with a personality, but since this personality is merely a legal fiction, the company cannot exercise any of its powers in person. Accordingly, it is essential that the company acts and conducts its business by means of authorised agents, termed directors. Prior to the 1929 Act, there was no statutory obligation upon a company to have directors, but by S. 139, Companies Act, 1929, it is provided that "every company registered after the commencement of this Act shall have at least two directors"; but this Section does not apply to *private* companies. It appears, however, that a private company must have at least one director, in order that the Balance Sheet may be signed in accordance with the requirements of S. 129.

### § 2.—Appointment of Directors.

The first directors of a company are usually appointed by and named in the Articles, but in such a case, the appointment is not valid, nor may a director be named in a prospectus or statement in lieu of prospectus, unless before the registration of the Articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, the director named has by himself or by his agent *authorised in writing* :—

- (a) signed and filed with the Registrar of Companies a consent in writing to act as such director; and
- (b) either :—
  - (i) signed the Memorandum for a number of shares not less than his qualification, if any; or
  - (ii) taken from the company and paid or agreed to pay for his qualification shares, if any; or

- (iii) signed and filed with the Registrar an undertaking in writing to take from the company and pay for his qualification shares, if any; or
- (iv) made and forwarded to the Registrar a statutory declaration to the effect that a number of shares, not less than his qualification, if any, are registered in his name (S. 140 (1)).

But these provisions do not apply to a company without a share capital, or to a private company, or to a public company which was a private company, or to a prospectus issued more than one year after the company was entitled to commence business.

Where first directors are not appointed by the Articles, it is provided by Table A that they may be appointed in writing by a majority of the subscribers of the Memorandum. Where the power of appointment is delegated to the subscribers but no provision is made for election by a majority, then all subscribers should sign the appointment (*Great Northern Salt Works* [1890] 44 Ch. D. 472); or a meeting of the subscribers should be held, at which the directors may be appointed by a simple majority of those present and voting.

The appointment of subsequent directors is usually provided for in the Articles. The appointment may be made:

- (a) by the company in general meeting by an ordinary resolution; or
- (b) by the continuing directors; or
- (c) by an outsider.

As to (b), if the Articles have delegated the authority to the board of directors, the company in general meeting has then no power to appoint, unless the board is unwilling to appoint.

As to (c), the Articles may give power to an outsider, e.g. vendor or mortgagee, to appoint one or more directors, and such power cannot be destroyed by any attempted alteration of the Articles, if the outsider can establish a contract distinct from the Articles giving him this right.

Every company must keep at its Registered Office a Register of Directors or Managers, containing the following particulars:

- (a) in the case of an individual, his present christian name and surname, any former christian name or surname, his usual residential address, his nationality, and, if that

nationality is not the nationality of origin, his nationality of origin, and his business occupation, if any, or, if he has no business occupation but holds any other directorship or directorships, particulars of that directorship or of some one of those directorships; and

- (b) in the case of a corporation, its corporate name and Registered or Principal Office (S. 144 (1)).

The company must, within 14 days of appointment of the first directors, send to the Registrar of Companies a Return in the prescribed form, containing the particulars specified in the said Register, and a notification in the prescribed form of any change among its directors or in any of the particulars contained in the Register, within 14 days of the change (S. 144 (2)).

The Register to be kept under this Section must, during business hours (subject to such reasonable restrictions as the company may by its Articles or in general meeting impose, so that not less than two hours in each day be allowed for inspection), be open to the inspection of any member of the company without charge, and of any other person on payment of one shilling, or such less sum as the company may prescribe, for each inspection (S. 144 (3)).

If the Articles make provision, or an agreement is entered into between any person and the company for empowering a director to assign his office to such other person, the assignment may be made, provided that it is approved by Special Resolution of the company. A Special Resolution is essential, notwithstanding that the Articles or the agreement provide otherwise (S. 151).

### § 3.—Qualification of Directors.

In accordance with the provisions of certain Acts of 1838 and 1841, no person performing the duties of an ecclesiastical office, or holding any cathedral preferment, benefice, curacy or lectureship, may act as director of a trading company, excepting a benefit society or life or fire assurance society. Furthermore, by the provisions of S. 142, Companies Act, 1929, if any person being an undischarged bankrupt acts as director of, or takes part in the management of, any company, except by leave of the Court by which he was adjudged bankrupt, he will be liable

to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding £500, or to both fine and imprisonment. Leave of the Court will not be given unless notice of intention to apply for leave has been given to the Official Receiver in bankruptcy, who may oppose the application if he thinks it contrary to public interest to grant the permission asked for. Undischarged bankrupts acting as directors of, or taking part in the management of, a company on the 3rd August, 1928, and continuing so to act are not, however, guilty of an offence under the above provisions, unless the bankruptcy was after that date (S. 142 (1)). Further, under Ss. 217 and 275, where the Court is satisfied that fraud has been committed by any promoter, director or other officer in the formation and conduct of the business of a company, it may make an order that such person may not, without leave of the Court, be a director or take part in the management of a company for a period not exceeding five years from the date of the order.

Apart from the above, there are no other statutory restrictions upon the class of persons who may act as directors, and, subject to any restrictions contained in the Articles, *any* person may be appointed a director, whether he be an infant or an alien, or whether he is a member of the company or not. A limited company may be appointed a director of another company, provided that it has the requisite power in its Memorandum (*Bulawayo Market Co.* [1907] 2 Ch. 458).

The Articles, however, generally impose restrictions as to the class of persons qualified to act as directors, and, as in Clause 66 of Table A, it is usual to require every director to become the holder of a specified number of shares in the company. Such a restriction is necessary by the rules of the London Stock Exchange, where an official quotation of shares is required.

Where the Articles of a company provide a share qualification for its directors, in addition to compliance with the provisions of S. 140, *supra*, directors must conform with S. 141, whereby, unless already qualified, they must obtain their share qualification within 2 months after appointment or such shorter time as the Articles may provide. Apart from the provisions of S. 140, however, a director need not take his qualification shares from

the company (*Brown's Case* [1873] 2 Ch. 102); but the holding of share warrants is not a sufficient qualification (S. 141 (2)); though a joint holding of shares may be sufficient (*Grundy v. Briggs* [1910] 1 Ch. 444). A person who accepts office as a director with knowledge of a share qualification clause in the Articles may be placed on the register of members for the requisite number of shares, if he fails to take up his shares in a reasonable time.

A director must vacate office if he does not, within two months or any less period fixed by the Articles, from the date of his appointment, obtain his qualification, or if he ceases at any time to hold his qualification shares; and any director who vacates his office for such reasons will be incapable of being reappointed until he has obtained his qualification (S. 141 (3) and (4)). But a director who is duly appointed and qualified will not vacate his office under S. 141 (3) if the requisite qualification is subsequently increased by Special Resolution, and he fails to take up the extra qualification within the prescribed period (*Molineaux v. London, Birmingham and Manchester Insurance Co.* [1902] 2 K.B. 589). Where the qualification clause provides that no person shall be "eligible" as a director unless he holds the requisite qualification, the possession of the qualification is a condition precedent to election, and if a person is elected who has not the qualification, he is not a director *de jure*. Such a provision, however, is uncommon, and it is usual to provide that the share qualification is a condition subsequent to appointment, for in such a case the validity of the appointment is not dependent upon obtaining the share qualification, though the retention of office is so conditional.

S. 141 (5) further provides that if an unqualified director acts as such after the prescribed period he is liable to a fine not exceeding £5 per day, and in *re Barry & Staines Linoleum Ltd.* [1934] Ch. 227, where an unqualified director applied to the Court for relief against the penalties imposed under S. 141, it was held that the Court had power to relieve him from such penalties, but it had no power to excuse him from surrendering to the company remuneration he had received whilst unqualified. The right to exempt the director from refunding the remuneration depends upon the wishes of the shareholders, or, if the company is insolvent, of the creditors.



Unless the Articles otherwise provide, a director need not be the beneficial owner of his share qualification, and it makes no difference that the Articles state that he must hold the shares "in his own right," as in such a case, the holding of shares as a trustee, executor or mortgagee will be sufficient; but if a person is entered on the register as holding shares as liquidator of some other company, he does not hold "in his own right."

It was held in *Knight v. World Barter & Trading Co.* [1935] C.A., that where the Articles of a company required a director's qualification shares to be held "in his own name and right," a director was properly so qualified where a transfer of shares to him stated it to be "a nominal transfer to the transferee in order to enable him to qualify as a director, the beneficial interest remaining in the transferors." The Court stated that shares held by a trustee are held in his own name and right.

A director who obtains his qualification shares by way of gift from vendors or promoters of the company, or who buys such shares with money given for the purpose by these persons, may be liable for breach of his fiduciary relationship to the company. A similar liability will arise if a director holds shares as trustee for the promoters, or if he takes up and pays for his qualification shares and at the same time receives a contract of indemnity or option to purchase from the promoters.

#### § 4.—Effect of Irregular Appointment of Directors.

The Articles of a company usually provide, as does Clause 88 of Table A, that all acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it is afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if such person had been duly appointed and was qualified to be a director. Further, S. 143 provides that the acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

Such provisions apply as between a company and its members, and as between a company and outsiders, providing only that the person claiming the benefit of the provisions has

acted *bona fide* without knowledge of the defect or disqualification; and this is so even if the facts constituting the irregularity are known, providing that the directors honestly believe that they have power to do the act in question.

**British Asbestos Co. v. Boyd** [1903] 2 Ch. 439. B, R and M were directors of a company whose Articles provided that it was a disqualification to hold any office of profit in the company. M resigned and B became secretary of the company for a time, thereby disqualifying himself. During this time, B and R appointed D as director. It was HELD that the appointment of D was valid.

### § 5.—Number and Rotation of Directors.

The Articles of the company usually settle the maximum and minimum number of directors, and these figures must not be disregarded unless the Articles are altered. The Articles may provide that the company shall be governed by any specified number of persons, not less than two in the case of a public company (S. 139). If the number of directors falls below the specified minimum, the remainder cannot act unless the Articles provide otherwise.

The Articles of the company usually provide for the rotation of directors by prescribing that a proportion of the directors (usually one-third) shall retire from office at the annual general meeting in each succeeding year. In such a case failure to hold such a meeting will prevent their re-election, and they cease to be directors on the last day on which such meeting could have been held (*Consolidated Nickel Mines* [1914] 1 Ch. 883). There is no statutory obligation for the rotation of directors, but Clauses 73 to 80 of Table A make adequate provision therefor, and for re-election to vacancies caused by rotation.

### § 6.—Remuneration of Directors.

Unlike an ordinary agent, a director of a company, although an agent thereof, *prima facie* is not entitled to any remuneration, but the Articles, as in Clause 65 of Table A, usually provide that the remuneration of the directors shall from time to time be fixed by the company in general meeting. Consequently, if the general meeting makes no award, directors will have no right to remuneration, unless the amount or rate of remuneration is specified in the Articles, in which case it becomes a specialty debt due from the company and payable out of

capital if there are no profits available. In a liquidation, remuneration can be claimed as an ordinary debt with no preference.

**Kerr v. Marine Products Ltd.** [1928] 44 T.L.R. 292. At a meeting of the board, a contract was signed appointing K "Overseas Director" at a salary of £1,800 per annum. The Articles provided that the remuneration of a director should be fixed by the *company in general meeting*. HELD that as the action of the board in fixing the remuneration was *ultra vires*, K could not recover the salary agreed upon, and must repay to the company sums received by him under the contract.

Where a director accepts office, he is deemed to do so upon the terms of the Articles and if he takes remuneration in excess of that provided in the Articles, he must refund to the company the excess, unless the company in general meeting ratifies the excessive payment. An agreement by one of several directors to waive his right to remuneration is not binding unless there is consideration for the release, but where all directors mutually agree to surrender their rights, then such agreement is binding on them.

Where the Articles provide for the payment of remuneration, the actual wording of the clause must be considered in determining whether or not remuneration may be apportioned over the actual period served by the director, or whether it is necessary to complete a year's service before any claim may be made. It is not yet definitely decided whether the Apportionment Act, 1870, applies to the remuneration of directors, and case decisions are too confusing to be strictly followed, but it appears that if the remuneration is "*at the rate of £— per annum*," a director who vacates his office before the expiration of a year may claim an amount proportionate to the period he has served; but if the remuneration is a certain sum (e.g. "£100 per annum" or "per year" or "a yearly sum of £100"), apparently no claim may be made for a portion of a year of service, as it is necessary to have completed a year's service before the remuneration becomes due and payable (*Inman v. Ackroyd and Best Ltd.* [1901] 1 K.B. 613).

The claim to remuneration depends also upon the validity of the appointment. It was held in *Woolf v. East Nigel Gold Mining Co.* [1905] 21 T.L.R. 660, that no remuneration could be recovered by a director who failed to take qualifying shares where the Articles made the qualification a condition precedent \*

to appointment. But where the appointment is valid, the director may claim remuneration although he acts without taking up his qualification shares, or becomes incapable of continuing in office because of some subsequent disability or disqualification (*Salton v. New Beeston Cycle Co.* [1899] 1 Ch. 775).

Directors' travelling expenses incurred in attending Board Meetings must not be paid by the company, unless the Articles provide, or such payments have been authorised by resolution of the company at a general meeting (*Young v. Naval, Military and Civil Service Co-operative Society* [1905] 1 K.B. 678).

Apart from the disclosure in the prospectus of any provisions in the Articles as to the remuneration of the directors, a more detailed disclosure must be made to members of the company in accordance with the provisions of S. 148, whereby the directors of a company shall, on a demand made to them in writing by members of the company entitled to not less than one-fourth of the aggregate number of votes to which all the members of the company are together entitled, furnish to all the members of the company within a period of one month from the receipt of the demand, a statement, certified as correct, or with such qualifications as may be necessary, by the auditors of the company, showing as respects each of the last three preceding years in respect of which the accounts of the company have been made up, the aggregate amount received in that year by way of remuneration or other emoluments by persons being directors of the company, whether as such directors or otherwise in connection with the management of the affairs of the company. In addition there shall, in respect of any such director who is:—

- (a) a director of any other company which is in relation to the first-mentioned company a subsidiary company; or
- (b) by virtue of the nomination, whether direct or indirect, of the company, a director of any other company;

be included in the said aggregate amount, any remuneration or other emoluments received by him for his own use, whether as a director of, or otherwise in connection with the management of the affairs of, that other company, and it shall be sufficient to state the *total aggregate* of all sums paid to, or other emoluments received by, all the directors in each year, without specifying the amount received by any individual.

But a demand for a statement under this Section shall be of no effect if the company within one month after the date on which the demand is made resolve that the statement shall not be furnished.

S.128, moreover, requires certain particulars concerning the remuneration of directors to be given in the accounts which are laid before the company in general meeting (see Ch. XI, § 5).

### § 7.—Vacation of Office by Directors.

As in the case of any other agent, a director is free to resign his office at any time, and it seems sufficient, as by Clause 72 of Table A, to resign office by notice in writing to the company served at the registered office. A resignation once made is irrevocable (*Glossop v. Glossop* [1907] 2 Ch 370), unless the company in general meeting or the board of directors permit.

Thus, in *Latchford Premier Cinema, Ltd. v. Ennion and Another* [1931] 47 T.L.R. 595, where the Articles of a company provided that a director's resignation must be in writing, it was held that where a director had submitted a verbal resignation which was accepted by the company in general meeting, such resignation was valid and could not be revoked by the director.

There are no statutory provisions giving the company power to remove a director, but the Articles usually follow Clause 80 of Table A, and provide that the company may, by extraordinary resolution, remove any director before the expiration of his period of office. If this power may be exercised for "reasonable cause," it is for the company at the meeting to decide what is reasonable cause, and, unless a case of fraud can be established in the passing of the resolution, the Court cannot interfere with the decision.

Apart from the loss of office under Ss. 141, 142, 217, and 275, *supra*, the regulations of the company usually provide for circumstances in which a director shall vacate office by reason of some special disqualification. Thus, special Articles may provide, as in Clause 72 of Table A, that the office of director shall be vacated, if the director:—

- (a) is found lunatic or becomes of unsound mind; or
- (b) becomes bankrupt [such a clause would prevent sanction of the Court from being given under S. 142]; or

- (c) voluntarily absents himself or is absent from meetings of the directors for a lengthened period; or
- (d) without the consent of the company in general meeting, holds any other office of profit under the company, except that of managing director or manager; or
- (e) is directly or indirectly interested in any contract with the company, or participates in the profits of any contract with the company. But a director shall not vacate his office by reason of his being a member of any corporation which has entered into contracts with, or done any work for, the company, if he shall have declared the nature of his interest in manner required by S. 149, but the director shall not vote in respect of any such contract or work or any matter arising thereout, and if he does so, his vote shall not be counted.

Upon disqualification, a director vacates office automatically, and if such a person continues to act, he may be restrained by the company obtaining an injunction from the Court; but an individual shareholder cannot take proceedings to restrain him.

As previously noted, the Articles, following the provisions of Clauses 73 to 80 of Table A, may make provision for the rotation of directors, and thereby cause a vacancy.

It is not lawful, in connection with the transfer of the whole or any part of the undertaking or property of a company, for any payment to be made to any director of the company by way of compensation for loss of office, or as consideration for or in connection with his retirement from office, unless particulars with respect to the proposed payment, including the amount thereof, have been disclosed to the members of the company and the proposal approved by the company.

Where any such illegal payment is made to a director of the company, the amount received shall be deemed to have been received by him in trust for the company.

Where a payment is to be made to a director of a company in connection with the transfer to any persons, as a result of an offer made to the general body of shareholders, of all or any of the shares in the company, it shall be the duty of that director to take all reasonable steps to secure that particulars with respect to the proposed payment, including the amount

thereof, shall be included in or sent with any notice of the offer made for their shares which is given to any shareholders.

If, in connection with any such transfer, the price to be paid to a director of the company whose office is to be abolished or who is to retire from office for any shares in the company held by him is in excess of the price which could at the time have been obtained by other holders of the like shares or any valuable consideration is given to any such director, the excess or the money value of the consideration, as the case may be, shall, for the purposes of this section, be deemed to have been a payment to him by way of compensation for loss of office or as consideration for his retirement from office (S. 150).

### § 8.—Legal Position of Directors.

There is no statutory definition of a director in the Act, and consequently the legal position of a director can be ascertained only by a reference to his position at Common Law. "Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners; it does not much matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it" (Per Jessel, M.R., in *Forest of Dean Co.* [1878] 10 Ch.D. 450). Further, per Lord Selborne, L.C., in *G.E. Railway Co. v. Turner* [1872] 8 Ch. 149, "directors are the mere trustees or agents of the company, trustees of the company's money and property, agents in the transactions which they enter into on behalf of the company." It becomes necessary, therefore, to consider the position of the director in these respective relationships of (i) agents, and (ii) trustees.

#### (1) AS AGENTS.

The ordinary legal principles of agency are applicable in so far as directors act as agents of the company. The company is, therefore, bound by all contracts made by directors within the true or the apparent scope of their authority. The principles of agency are, however, modified to some extent by the fact that every person contracting with a company is deemed to have knowledge of the contents of the Memorandum and

Articles, for where a director purports to make a contract which is *ultra vires* the company, it may be pleaded that he is not acting within the apparent scope of his authority. To some extent a similar state of affairs will exist where a director makes a contract which, though not *ultra vires* the company, is beyond the true scope of his authority because of the provisions of the Articles, e.g. where the Articles require the directors to obtain sanction from the company. But in these circumstances the company may be liable under the rule in *Royal British Bank v. Turquand* (see Ch. IV, § 12).

By virtue of their position as agents, directors may not retain any secret profit made in the execution of their duties as directors. Secret profits may be made where the director enters into a contract, or is interested in any contract with the company. "A director of a company is precluded from contracting on behalf of the company with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those to whom he is bound by his fiduciary duty; and this rule is as applicable to the case of one of several directors as to a managing or sole director" (*North-West Transportation Co. v. Beatty* [1887] 12 A.C. 589).

These principles will not, however, prevent a director from subscribing for shares or debentures of a company of which he is a director. Neither will they operate to prevent a director from making a profit in his individual capacity, or where the profit is not made at the expense of the company, although individual shareholders may suffer loss. Directors are agents and trustees for the company, not for individual shareholders.

**Percival v. Wright** [1902] 2 Ch. 421. Directors of a company entered into a contract for the sale of the company's business at a very high price. Knowing that the price of the shares would increase when the scheme became public, the directors bought the shares of a shareholder, Percival, who had no knowledge of the scheme. Subsequently the directors sold the shares at a considerable profit when the scheme became public, and Percival claimed the profit so made. HELD that the directors could retain profit so made, as it was not a secret profit made from a transaction conflicting with their position as agents and trustees for the company.

Usually, however, the application of the aforementioned rule is excluded or restricted by provisions in the Articles, whereby a director may enter into contracts or be interested



in contracts with the company, but must disclose the nature of such interest to the board, and must not vote in regard to the matter. Formerly this duty of disclosure was a matter of Common Law, but now there is a statutory duty to disclosure in accordance with the provisions of S. 149, which provides that it shall be the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company, to declare the nature of his interest at a meeting of the directors of the company.

In the case of a proposed contract, the declaration required by this Section to be made by a director shall be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration, or if the director was not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he became so interested, and in a case where the director becomes interested in a contract after it is made, the said declaration shall be made at the first meeting of the directors held after the director becomes so interested (S. 149 (2)). But a general notice given to the directors of a company by a director to the effect that he is a member of a specified company or firm, and is to be regarded as interested in any contract which may, after the date of the notice, be made with that company or firm, shall be deemed to be a sufficient declaration of interest in relation to any contract so made (S. 149 (3)).

Any director who fails to comply with the provisions of this Section shall be liable to a fine not exceeding one hundred pounds (S. 149 (4)).

It is uncertain whether a director who holds shares in another company is to be deemed to be interested in contracts made with the company, the shares of which he holds, for the purposes of S.149. If he is to be deemed to be interested, he must declare his interest to his board in accordance with the provisions of the section.

The view that he is to be deemed to be interested in all contracts made with other companies, the shares of which he holds, is supported by the decision in *Transvaal Lands Co. v. New Belgium Land Co.* [1914] 2 Ch. 448, and it appears, moreover, that the fact that he holds the shares as trustee only does not release him from the duty to declare his interest (*Todd v. Robinson* [1884] 14 Q.B.D. 739).

## (2) AS TRUSTEES.

It has been previously stated that directors are trustees, but this statement requires some modification, in that, whereas a true trustee has the legal or equitable title to the trust property, a director has no title to the company's property vested in him.

But subject to these modifications, directors are trustees for the company, of the company's money and property, and of assets which come into their hands or are under their control. This fiduciary relationship, however, does not, as decided in *Percival v. Wright, supra*, make directors trustees for individual shareholders.

Directors are in the position of trustees as regards the exercise of their powers, for all such powers must be discharged for the benefit of, and in the interests of, the company as a whole, and not for the particular benefit of the directors, or a class of shareholders. Such a duty extends, *inter alia*, to the exercise by the directors of their powers of declaring a forfeiture of, or accepting a surrender of, shares, making calls or accepting calls in advance, registering or rejecting a transfer of shares, allotting shares, and declaring dividends.

**Sykes' Case** [1872] 13 Eq. 255. A limited company had no available assets for the payment of directors' fees. Under power in the Articles, the directors paid the amount due on their shares as calls in advance. This fund was then employed to pay the remuneration to the directors. HELD, that the payment of calls in advance under such circumstances was not *bona fide* in the interests of the company, and the directors still remained liable to the company for the amount as unpaid on their shares.

## § 9.—Liability of Directors.

## (1) LIABILITY TO THIRD PARTIES.

In respect of contracts made on the company's behalf a director is liable to the contractor only where the circumstances are such that any agent would be liable.

In general, an agent who contracts as such, incurs no personal liability; but there are a number of exceptions to this rule, e.g. where the agent signs a bill of exchange otherwise than *per pro.* or for and on behalf of his principal.

If directors wish to avoid personal liability on negotiable instruments, they must sign in such a form as to exclude personal liability, remembering that S.26 (1), Bills of Exchange

Act, 1882, has provided that the mere addition to a signature of words describing the person signing as an agent, or as filling a representative character, does not exempt the signatory from liability.

It is necessary then to sign "for," or "on account of," or "on behalf of," or "*per pro.*" the company, as the mere word "director" after the personal signature of a person is not sufficient to exclude personal liability. Thus, where a bill is addressed to the company and accepted by "J.M., Secretary to the company," the secretary is personally liable (*Penrose v. Martyn* [1858] 6 W.R. 603); but in *Chapman v. Smethurst* [1909] W.N. 65, where a promissory note was signed "I promise to pay, etc., J. H. Smethurst's Laundry and Dye Works, Limited, J. H. Smethurst, Managing Director," it was held that the managing director was not personally liable. In *Landes v. Marcus* [1909] 25 T.L.R. 478, a cheque drawn in favour of the plaintiffs was stamped near the top "B. Marcus & Co. Limited" and signed "B. Marcus, Director, S. H. Davids, Director, —Secretary." It was held that the two directors were personally liable.

An agent who exceeds his authority and purports to make a contract which in fact is not binding on his principal may be sued for breach of warranty of authority. Consequently, where a director enters into a contract which is *ultra vires* the company, the company is not liable, but the director himself may be personally liable for breach of implied warranty of authority, on the ground that he has held himself out as having authority to bind the company on the contract in question. But the director will not be liable if the fact that the contract was *ultra vires* would be apparent on examination of the Memorandum or Articles (*Rashdall v. Ford* [1866] L.R. 2 Eq. 750).

A director, even though acting within the scope of his authority, may incur liability to the other contracting party, where he signs or authorises to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque or order for money or goods, wherein the company's name is not adequately described (S. 93 (4), see Ch. IV, § 2).

The directors will be personally liable to third parties for tortious acts which they themselves commit, and this is so even if the wrongful act is committed by the directors acting

as agents for the company. If the act was committed within the real or apparent scope of authority of the directors, the company also will be liable. But a director is not to be held personally liable for the fraud of his co-director, unless he had expressly or impliedly authorised the commission of the fraudulent act.

The liability of the company and directors in the case of fraudulent misrepresentation in the prospectus has already been noted (*ante*, Ch. V, § 5).

(2) LIABILITY TO THE COMPANY.

Under S. 276 of the Act, if in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the Official Receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator, or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the Court thinks just.

Under this section a director may be made to refund to the company moneys entrusted to him which have been dealt with in some unauthorised manner, e.g.:—

- (a) unauthorised commission paid to underwriters (*Faure Electric Accumulator Co.* [1889] 40 Ch. D. 141);
- (b) discounts unlawfully allowed to allottees of shares (*Hirsche v. Sims* [1894] App. Ca. 654);
- (c) remuneration to which the directors were not entitled (*Merchants' Fire Office v. Armstrong* [1901] W.N. 163);
- (d) dividends paid where no profits were available (*Sharpe and Bennett* [1892] 1 Ch. 154).

The section applies only where the company is being wound up, but before a winding up the company has similar rights against directors which may be enforced by action.

Where two or more directors join in misapplying money, their liability is joint and several.

**Walsh v. Bardsley** [1931] 47 T.L.R. 564 Two directors joined in signing a cheque whereby the company's money was used for an unauthorised purpose. The money was applied solely for the benefit of one of the directors, who was compelled to refund it. HELD, he could not claim a contribution from the other director.

Under S. 275, if in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court, on the application of the Official Receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any of the directors, whether past or present, of the company who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct. Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any such director under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any company or person on his behalf, or any person claiming as assignee from or through the director, company or person, and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this section.

A director may also incur liability for negligence in the exercise of his duties. "By accepting a trust, a person is bound to exercise it with fidelity and reasonable diligence" (Lord Hardwicke in *Charitable Corporation v. Sutton*, 2 Atk. 400). There is no statutory definition of negligence, and consequently each case must be decided after due consideration of the particular facts thereof. When considering a director's liability, no distinction must be drawn between "gross" and

“ordinary” negligence. If it can be proved that the company has suffered damage as a result of a negligent act of a director, it is no defence to show that such director was not guilty of “gross” negligence—whatever that may mean. The question to be answered in each case is : “Has the director exercised the necessary care and shewn the necessary diligence in the discharge of his duties?” If he has, there can be no question of liability.

“Directors are bound to use fair and reasonable diligence in the discharge of their duties, and to act honestly, but they are not bound to do more” (Jessel, M.R., in *Forest of Dean & Co.*, *supra*). “If directors act within their powers and with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company, they discharge both their legal and equitable duty to the company, and will not be liable for mistakes or errors of judgment” (*Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate* [1899] 2 Ch. 392). Directors are expected to use all the ordinary prudence that can be properly and legitimately expected from any person in the conduct of the affairs of the world, *viz.*, the same amount of prudence which in the same circumstances he would exercise on his own behalf.

A director is entitled to rely on the judgment and information of all persons who have been placed in a position of trust for the express purpose of attending to the details of management of the company’s business, provided that he has no reason for questioning such a person’s integrity, skill and competence. Thus, even if the company suffers loss by such reliance, the directors may not be sued for negligence.

Furthermore, it is essential to an action for negligence that the company shall suffer damage, as negligence without damage is not actionable; and the reverse is also true, that damage without negligence is not actionable.

Apart from the many statutory penalties which may be incurred by directors for non-compliance with specified provisions of the Act, the directors may incur criminal liability either at Common Law or by virtue of some statute. Thus, in *Burnes v. Pennell* [1849] 2 H.L.C. 479, directors who were parties to the payment of a fictitious dividend in order to raise the price of the company’s shares, were held criminally liable for a conspiracy, and liability may also be incurred under the

Larceny Act, 1861. Moreover, if any person in any return, report, certificate, balance sheet, or other document, required by or for the purposes of any of the provisions of the Act specified in the Eleventh Schedule thereto, wilfully makes a statement false in any material particular, knowing it to be false, he shall be guilty of a misdemeanour, and shall be liable on conviction in Scotland on indictment to imprisonment for a term not exceeding two years, with or without hard labour, and be liable on summary conviction in England or Scotland to imprisonment for a term not exceeding four months, with or without hard labour, and in either case to a fine in lieu of or in addition to such imprisonment as aforesaid. Provided that:—

- (a) the fine imposed on summary conviction shall not exceed one hundred pounds;
- (b) nothing in this Section shall affect the provisions of the Perjury Act, 1911 (S. 362).

Under the Prevention of Bribery and Corruption Act, 1906, directors may be liable to fine and imprisonment for accepting or agreeing to accept bribes, whilst acting in the performance of their duties as directors of the company.

Finally, under the Perjury Act, 1911, directors may be liable for giving false evidence on oath or in any affidavit in all those cases where, under the provisions of the Act, oath may be administered or an affidavit or disposition be required.

The Memorandum of a limited liability company may provide that the liability of the directors, managers or managing director shall be unlimited (S. 146 (1) ), and in a winding up, in such a case any director or manager may be called upon to contribute to the payment of the company's debts as if he were a member of an unlimited company (S. 157 (2) ). The latter liability is subject, however, to the following limitations:—

- (a) a past director or manager shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up;
- (b) a past director or manager shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office:

- (c) subject to the Articles of the company, a director or manager shall not be liable to make such a contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding up (*ibid.*).

Where under S. 146, the Memorandum provides for the unlimited liability of directors, the directors or managers of the company *and* the member who proposes a person for election or appointment as a director or manager must add to his proposal a statement that the liability of the person holding the said office will be unlimited, and in addition the promoters, directors, managers and secretary, if any, or one of them, must before the person accepts the offer or acts therein, give him notice in writing that his liability will be unlimited (S. 146 (2)). Default penalty, £100.

If authority is given by the Articles, a limited liability company may alter its Memorandum by special resolution so as to render unlimited the liability of its directors or managers or of the managing director, and any such alteration shall be as valid as if it had been originally contained in the Memorandum (S. 147).

### § 10.—Remedies against Directors.

The civil remedy against a director, whether for negligence, fraud, misfeasance or breach of trust is, if the company is not in course of liquidation, by action for damages. But if the company is being wound up, "misfeasance" proceedings may be taken in accordance with S. 276, which gives the Court power to order a director guilty of misfeasance or breach of trust to restore the misappropriated property.

Action must be brought in the name of the company against defaulting directors causing loss to the company. For an injury to the company, individual shareholders cannot sue, unless the defaulting persons themselves hold the majority of the shares and exercise the controlling power, and consequently refuse to bring an action in the name of the company. In such circumstances, however, the Court may permit a shareholder to sue in the name of the company.

A director may be freed from liability for negligence or breach



of trust under S. 372, which provides that the Court may give relief where it appears that:—

- (a) the person sued has ACTED HONESTLY AND REASONABLY;  
and
- (b) the circumstances are such that he OUGHT FAIRLY TO BE  
EXCUSED.

By S. 152, any provision, whether contained in the Articles or in any contract with a company or otherwise, for exempting any director, manager or officer of the company, or any person (whether an officer of the company or not) employed by the company as auditor, from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void, provided that a company may, in pursuance of any such provision as aforesaid, indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour, or in which he is acquitted, or in connection with any application under S. 372 of the Act in which relief is granted to him by the Court.

In *Tomlinson v. Scottish Amalgamated Silks Ltd. Liquidators* [1934] S.C. 85, where the Articles of a company provided for indemnification for expenses incurred “by reason of acts done by a director in discharge of duties,” it was held that this would not permit a director to claim indemnity against expenses incurred in successfully defending a criminal charge of fraud as a director, on the ground that such proceedings were too remote a consequence of acting as a director.

### § 11.—Proceedings of Directors.

The extent of the powers of directors depends upon any restrictions thereon in the Articles, and upon the fact that the Act provides that certain acts may only be performed or powers exercised by the company in general meeting. It is usual, therefore, for Articles to vest the management of the general powers of the company in directors, by making provision, as in Clause 67 of Table A, that the directors may exercise all the powers of the company, except in so far as the Articles provide otherwise, and that no regulation made by the company in

general meeting shall invalidate any prior act of the directors which would have been valid had the regulation not been made.

It follows, then, that if the directors act *bona fide* in the interests of the company, they cannot be interfered with by the members of the company, except in so far as some measure of control is reserved to members in a general meeting.

From the decision in *Barron v. Potter* [1914] 1 Ch. 895, it seems that where the directors fail or are unwilling to exercise the powers granted to them by the Articles, the company in general meeting may exercise the right. Thus, if the directors fail to appoint new directors, although authorised to do so by the Articles, the company in general meeting may appoint.

As a general rule, it is only when acting as a "Board" that the directors can exercise their powers, and unless permitted by the Articles, or unless authority may be implied, as in *Royal British Bank v. Turquand*, the acts of individual directors cannot bind the company. It is, however, the general practice of companies to permit a delegation of powers to (i) a committee of directors, or (ii) individual directors, or (iii) one or more managing directors.

As to (i) *supra*, if Articles sanction a delegation of powers to a committee, they usually follow the provisions of Clauses 85 and 86 of Table A, which provide that:—

- (1) The directors may delegate any of their powers to COMMITTEES consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on it by the directors.
- (2) A committee may elect a CHAIRMAN of its meetings; if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

As to (iii) *supra*, the Articles usually provide that the directors may appoint one or more of their body as managing directors on such terms and at such remuneration as they think fit, such managing directors to be exempt from the provisions of the Articles as to the retirement of directors. Clause 68 of Table A may be taken as a model for this purpose.

Even if Articles permit such a delegation, the company cannot divest itself of the power to control such managing directors, and any clause in the Articles attempting to destroy this right of control would be *ultra vires* and void (*Horn v. Faulder & Co.* [1908] 99 L.T. 524).

Where a power of revocation is left with the company, such a power may only be exercised strictly in accordance with any provisions in the Articles justifying a revocation.

**Nelson v. James Nelson & Sons** [1914] 2 K.B. 770. Under power in the Articles, which also gave right of revocation, a managing director was appointed upon such terms that he should hold office so long as he was a director of the company and retain his qualification shares. It was HELD that the board could not revoke the appointment so long as the managing director continued to comply with the terms of the agreement.

Subject to any contrary provisions in the Articles, the managing director must vacate his office if for any reason he ceases to hold the office of director of the company, and this is so even if his original appointment is for a fixed term. Consequently, it is usual to provide that the managing director shall not be subject to retirement by rotation, as in Clause 68 of Table A.

If the Articles provide that a director may not vote in respect of any contract in which he is interested, it has been decided in *Foster v. Foster* [1916] 1 Ch. 532, that the appointment of a member of the board as managing director is a contract upon which the director may not vote, if there is a right to remuneration attaching to the office.

Where powers of management are not delegated to a committee or a managing director, such powers may only be exercised by a board meeting duly convened and properly constituted.

Due notice must be given convening a meeting of the board of directors, and the notice must comply with any provisions in the Articles as to the time and place of the meeting, but in the absence of such provisions, reasonable notice of the meeting must be given.

The notice must be given to all the directors, unless a director is abroad beyond summoning distance or is too ill to attend, and the mere fact that a director declares his inability to attend and states he does not require notice, will not exempt

notice being in fact given (*Portuguese Consolidated Copper Mines* [1889] 42 Ch.D. 160).

Subject to any provisions in the Articles, notice of a meeting may be in any form, oral or otherwise, and it need not disclose the special nature of the business to be transacted.

Finally, the notice must be issued by or under the authority of the person entitled to convene such meetings. Usually the secretary convenes, acting under the authority from a director. But where the Articles, or the directors themselves provide that meetings shall be held at regular or stated intervals, there is no necessity to give notice of each meeting.

If there has been some defect in the calling of the meeting, the meeting is irregular and all proceedings thereat are invalid, but this is subject to the proviso that if in fact all directors are present at the meeting, they may waive any irregularities in the convening of the meeting (*Express Engineering Works* [1920] 1 Ch. 466). Furthermore, a subsequent regularly convened meeting of the board may regularise all matters effected at a former irregular meeting.

The Articles generally fix, or enable the directors to fix, the QUORUM required for the proper constitution of a board meeting, and unlike the requirements for a meeting of the company, a quorum of directors may be one (*Fireproof Doors* [1918] 2 Ch. 142). If no quorum has been fixed by the Articles, the number who usually act may constitute a quorum (*Lyster's Case* [1867] 16 L.T. 824). Clause 82 of Table A provides that, unless a quorum is fixed by the directors, it shall be:—

- (a) three when there are more than three directors; or
- (b) two when there are not more than three directors.

The quorum must be a *disinterested* quorum: i.e. a director cannot be counted in a quorum of a meeting which purports to deal with a matter on which he is not entitled to vote (*Ywill v. Greymouth Point Elizabeth Rly.* [1904] 1 Ch. 32). Nor can such a director vote on a resolution to alter the quorum to enable him to vote on a matter in which he is personally interested (*North Eastern Insurance Co.* [1919] 1 Ch. 198).

If the requisite quorum is not present, the meeting is irregular, and no business may be transacted thereat, and if the number of directors fall below the minimum required for a quorum,

then, unless the Articles give power to act despite vacancies, no board meeting may be held.

Despite any provisions in the Articles with reference to a quorum, *all* directors of the company must receive notice of a meeting of the board.

### § 12.—Appointment of Secretary.

The Act does not specifically require a company to have a secretary, but in practice, such an officer is invariably appointed, as there are a number of administrative acts which no other functionary can so efficiently perform.

The first secretary of the company is usually nominated and appointed by the Articles, but such an appointment does not bind the company (*Eley v. Positive Assurance Co.* [Ch. IV, § 12]). If no appointment is made by the Articles, the company in general meeting has power to make the appointment, although it is usual, where the power of management has been delegated to a board of directors, for the directors to appoint the secretary. The fixing of the salary of the secretary, which is a matter of agreement, is also a matter which goes with the power of appointment.

Unless the terms of appointment of the secretary prescribe a fixed period of service, the appointment is upon terms similar to those agreed to by other employees of the company, and the secretary may not, therefore, be removed from office unless reasonable notice is given to terminate the service, except in case of misconduct (e.g. receiving bribes), when he would be liable to immediate dismissal.

### § 13.—Powers and Duties of the Secretary.

The secretary is a servant of the company, acting under the instructions of the directors, and as described by Esher, M.R. in *Barnett v. South London Tramways Co.* [1887] 18 Q.B.D. 815, "his position is that he is to do what he is told, and no one can assume that he has any authority to represent anything at all, nor may anyone assume that statements made by him are necessarily to be accepted as trustworthy without further enquiry." Thus, without further confirmation, persons cannot bind the company by acting on representations made by the secretary.

Following the decision in *Lloyd v. Grace Smith & Co.* [1912] A.C. 176, the secretary acting as agent of the company may

bind the company by contracts or torts, committed by him in the actual or apparent scope of his authority, and it matters not whether the benefit of the act is for the company or whether the secretary intended to take the benefit of the act for himself.

Apart from the many duties imposed upon him by the Act, the legal position and authority of the secretary are regulated by the Common Law.

His first duty is to make himself acquainted with the provisions of the Memorandum and Articles, and with any special provisions therein relative to himself, and since these documents are public, knowledge thereof is imputed to all persons; and as a consequence, the secretary cannot bind the company by acts inconsistent with the special provisions.

The secretary has no implied authority to summon general meetings of the company (*State of Wyoming Syndicate* [1901] 2 Ch. 431); nor may he register a transfer of shares unless the same is passed and authorised to be registered by the directors (*Chida Mines, Ltd. v. Anderson* [1905] 22 T.L.R. 27); nor has he power to strike the name of a shareholder from the register. The company is not bound by the unauthorised act of its secretary, unless the act is made valid by ratification.

**Kepitigalla Rubber Estates v. National Bank of India** [1909] 25 T.L.R. 402. Bankers paid cheques purported to be drawn on them by two directors of the customer company. Although such directors had authority to sign on behalf of the company, the secretary had in fact forged the signatures of the two directors. HELD that the bank could not debit the company's account with the amount of the cheques paid, as the company could not be held liable on the forged instruments.

Apart from the liability for statutory penalties for non-compliance with certain provisions of the Act, a secretary may incur personal liability in all cases where an agent would be personally liable. He would thus be liable for misfeasance if he receives an improper commission, e.g. by accepting presents or bonuses from promoters, directors or other persons (*McKay's Case* [1876] 2 Ch.D. 1); but where directors have misapplied funds of the company, the knowledge by the secretary of such default will not make him personally liable (*Joint Stock Discount Co. v. Brown* [1869] 20 L.T. 844).

The secretary of the company is deemed an officer of the company, and may be privately or publicly examined in a winding-up, or may be proceeded against under S. 276 as a delinquent officer.

Finally, the secretary may be a clerk or servant within the provisions of S. 264, and entitled to his salary as a preferential creditor, but it appears from *Cairney v. Back* [1906] 2 K.L.J. 746, that a secretary of a company who does not give his whole time to the appointment is not within the provisions of that section.

#### § 14.—Company's Contracts.

At Common Law, subject to certain minor exceptions, a corporation aggregate is not bound by any contract made on its behalf unless the same is made in writing under the corporation's seal, but this rule does not apply to companies governed by the Companies Act, 1929, for by S. 29 it is provided that:—

- (1) A contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company.
- (2) A contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied.
- (3) A contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied.

A company, with the assistance of its executive may, therefore, employ the contractual forms which may be employed by individual contractors, e.g. it need not contract by deed unless the type of contract contemplated is such as requires a deed in the case of individual contractors. But this rule must be read in conjunction with the Articles, which may impose upon the directors a duty to make specified contracts under the corporate seal.

The validity of a company's contract may, however, be materially affected by the application of the doctrine of *ultra vires* discussed in Chapter IV.

### § 15.—The Common Seal.

By virtue of S. 13 (2), a company incorporated is to have a common seal, and further, under S. 93, every company must have its name engraven in legible characters on its seal.

The purpose and necessity of the seal is that it may be affixed to, and thus supply evidence that the company assents to, all contracts, which by virtue of Common Law, or statutory provision, or expressed provision in the Memorandum or Articles must be entered into under the common seal of the company.

*Prima facie* the executive of the company is entitled to use the seal (*Barned's Banking Co.* [1867] 3 Ch. 105); but usually the Articles contain special provisions thereto, e.g. that the seal must be affixed in the presence of, and the document signed by, two directors (who may be named) and the secretary.

In the case of sealed documents under the hand of individuals, delivery is necessary to bind them, but in the case of a company, sealing alone is sufficient, and the deed is operative thereby, although this assumption would not prevent a company executing a deed in escrow.

It is said that the common seal of the company is required to enter into contracts by deed, but a document, e.g. a share certificate, to which the common seal is applied, does not thereby become a deed.

### § 16.—Official Seal for Use Abroad.

In addition to its common seal, it may be necessary that a company shall have an official seal for use abroad, and in connection therewith, S. 32 has provided that a company with foreign interests may have separate seals for use out of the United Kingdom, and that documents bearing such seals shall be binding on the company. Moreover, the company may by writing under its common seal appoint any persons to affix its official seal, but where such persons are thus appointed, their authority to bind the company will continue:—

- (a) for the period named in the appointing instrument; or
- (b) if no period is named, until notice of the revocation of the authority is given (S. 32 (4)).

A company may also by writing under its common seal appoint a person to execute deeds on its behalf in any place outside the United Kingdom (S. 31).





## ABSTRACT OF CHAPTER XI

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### BOOKS, ACCOUNTS AND AUDIT

- § 1.—ACCOUNTS WHICH MUST BE KEPT.
- § 2.—PROFIT AND LOSS ACCOUNT AND BALANCE SHEET.
- § 3.—REQUIREMENTS AS TO THE BALANCE SHEET.
- § 4.—PARTICULARS AS TO SUBSIDIARY COMPANIES.
- § 5.—PARTICULARS AS TO LOANS TO AND EMOLUMENTS OF DIRECTORS,  
ETC.
- § 6.—APPOINTMENT AND REMUNERATION OF AUDITORS.
- § 7.—AUDITORS' RIGHTS OF ACCESS TO BOOKS.
- § 8.—WHAT THE AUDITORS' REPORT MUST STATE.
- § 9.—AUDITORS ENTITLED TO ATTEND GENERAL MEETINGS.
- § 10.—INVESTIGATION OF COMPANY'S AFFAIRS BY INSPECTORS.



## CHAPTER XI

# BOOKS, ACCOUNTS AND AUDIT

### § 1.—Accounts Which Must be Kept.

The Companies Act, 1929, introduced a number of important provisions relating to the books of account to be kept by every company, whether limited by shares, or by guarantee, or unlimited.

S. 122 provides that:—

(1) Every company shall cause to be kept proper books of account with respect to:—

- (a) all sums of *money* received and expended by the company and the *matters* in respect of which the receipt and expenditure takes place;
- (b) all sales and purchases of *goods* by the company;
- (c) the *assets and liabilities* of the company.

(2) The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and shall at all times be open to inspection by the directors.

(3) If any person being a director of a company fails to take all reasonable steps to secure compliance by the company with the requirements of this section, or has by his own wilful act been the cause of any default by the company thereunder, he shall, in respect of each offence, be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £200: Provided that a person shall not be sentenced to imprisonment for an offence under this section unless, in the opinion of the Court dealing with the case, the offence was committed *wilfully*.

The effect of S. 122 (1) is that the usual Cash Book, Purchases and Sales Day Books, and Personal and General (or Private) Ledgers must be kept. The Act imposes no duty to preserve Vouchers, but no director who claims any business acumen

would fail to obtain and to keep for a reasonable period of time satisfactory vouchers, apart altogether from any requirements of the professional auditors.

## § 2.—Profit and Loss Account and Balance Sheet.

By S. 123, the documents to be laid before the company in general meeting must include:—

- (i) A Profit and Loss Account; and
- (ii) A Balance Sheet, to which is attached—
- (iii) A Directors' Report dealing with—
  - (a) the state of the company's affairs;
  - (b) recommendation as to any dividend;
  - (c) proposals as to any transfer to the reserve.

A copy of the Auditors' Report must be attached to the Balance Sheet (S. 129).

Moreover, by S. 130, in the case of *other than private companies*—

- (i) a copy of every Balance Sheet (including every document required by law to be annexed thereto) which is to be laid before the company in general meeting; together with—
- (ii) a copy of the Auditors' Report,

must, not less than 7 days before the date of the meeting, be sent "to all persons entitled to receive notices of general meetings;" the person entitled will depend upon the rights of members as laid down by the Articles [usually, according to the modern practice, only Ordinary Shareholders will be so entitled, unless the preference dividends are (say) six months in arrear]. In cases of default, the company and every officer is liable to a fine not exceeding £20. Further, *any member* of such a company, whether or not he is entitled to have such copies sent to him before the meeting, and *any debenture holder*, is entitled to be furnished, within 7 days of demand and without charge, with a copy of the last Balance Sheet and its annexed documents and a copy of the related Auditors' Report. In cases of default, the company and every officer who is knowingly a party is liable to a fine not exceeding £5 a day.

S. 130 provides also that *every member of a private company* is entitled to be furnished, within 7 days of request, with a copy of the Balance Sheet and of the Auditors' Report, at a charge not exceeding 6d. for every 100 words. If default is made in this regard, the company and every officer is "liable to a default fine" [i.e. by S. 365, a fine not exceeding £5].

S. 123 is very important for all Accountants and Secretaries:

(1) The directors of every company shall at some date not later than 18 *months after the incorporation* of the company and *subsequently once at least in every calendar year* lay before the company in general meeting a Profit and Loss Account or, in the case of a company not trading for profit, an Income and Expenditure Account for the period, in the case of the first account, since the incorporation of the company, and, in any other case, since the preceding account, made up to a date not earlier than the date of the meeting by more than 9 months, or, in the case of a company carrying on business or having interests abroad, by more than 12 months: Provided that the Board of Trade, if for any special reason they think fit so to do, may, in the case of any company, extend the period of 18 months aforesaid, and in the case of any company and with respect to any year, extend the periods of 9 and 12 months aforesaid.

(2) The directors shall cause to be made out in every calendar year, and to be laid before the company in general meeting, a Balance Sheet as at the date to which the Profit and Loss Account, or the Income and Expenditure Account, as the case may be, is made up, and there shall be attached to every such Balance Sheet a report by the directors with respect to the state of the company's affairs, the amount, if any, which they recommend should be paid by way of dividend, and the amount, if any, which they propose to carry to the reserve fund, general reserve or reserve account shown specifically on the Balance Sheet, or to a reserve fund, general reserve or reserve account to be shown specifically on a subsequent Balance Sheet.

(3) If any person being a director of a company fails to take all reasonable steps to comply with the provisions of this section, he shall, in respect of each offence, be liable on summary conviction to imprisonment for a term not exceeding



- (2) Its LIABILITIES AND ASSETS, together with such particulars as are necessary to disclose their general nature and to distinguish between the amounts of fixed and floating assets, and stating how the values of the *fixed* assets have been arrived at.
- (3) Under separate headings, so far as they are not written off:—
  - (a) the PRELIMINARY EXPENSES; and
  - (b) any EXPENSES incurred in connexion with any ISSUE of shares or debentures; and
  - (c) the amount of the GOODWILL, and of any PATENTS and TRADE MARKS, shown in the books as a separate item or ascertainable from the books, or contracts, or documents in the possession of the company relating to stamp duty.
- (4) Where any LIABILITY of the company is SECURED (otherwise than by operation of law) on any of its assets, a statement to that effect, but the *particular* assets need *not* necessarily be specified.

The above mentioned provisions are in addition to others which the Act requires in appropriate cases, e.g.:—

- (i) S. 44. Any COMMISSIONS paid in respect of any SHARES OR DEBENTURES, or allowed as DISCOUNT ON DEBENTURES, the total amount so paid or allowed, in so far as not written off, must be stated in every Balance Sheet.
- (ii) S. 45. The aggregate amount of any outstanding LOANS made to enable EMPLOYEES, or trustees for employees, to purchase fully paid shares, must be shown as a separate item in every Balance Sheet.
- (iii) S. 46. A statement specifying what part of the issued capital consists of REDEEMABLE PREFERENCE SHARES, and the date on or before which such shares are, or are liable, to be redeemed, must be included in every Balance Sheet.
- (iv) S. 47. Particulars of any DISCOUNT allowed [where authorised by Resolution in general meeting and sanctioned by the Court] on the issue of SHARES, in so far as not written off, must be contained in every Balance Sheet subsequently issued.



- (v) S. 57. Where [in connexion with a reduction of capital] a company is ordered to add to its NAME the words "AND REDUCED," these words must, until the expiration of the period specified in the order, be deemed to be part of the name of the company, e.g. IN THE HEADING of a Balance Sheet issued during that period.
- (vi) S. 75. Where a company has power to RE-ISSUE redeemed debentures, particulars as to the DEBENTURES which can be so re-issued must be included in every Balance Sheet.
- (vii) S. 125. ASSETS consisting of shares in, or amounts owing from, SUBSIDIARY COMPANIES and LIABILITIES consisting of amounts owing to SUBSIDIARIES must be set out separately in the Balance Sheet [see § 4, *infra*].
- (viii) S. 126. In the case of HOLDING COMPANIES, a statement must be annexed to the Balance Sheet stating HOW PROFITS AND LOSSES OF SUBSIDIARIES, in so far as they concern the holding company, have been DEALT WITH in or for the purposes of the accounts of the holding company [see § 4, *infra*].
- (ix) S. 128. The accounts *to be laid before the company in general meeting* must contain particulars of LOANS TO, AND REMUNERATION OF, CERTAIN DIRECTORS, etc. [see § 5, *infra*].
- (x) S. 348. In the case of a COMPANY INCORPORATED OUTSIDE GREAT BRITAIN, which has a place of business in Great Britain, it must cause the name of the company *and* of the COUNTRY IN WHICH IT IS INCORPORATED to be stated in legible characters in all . . . advertisements, and other official publications of the company, e.g. IN THE HEADING of any Balance Sheet published here.

Every Balance Sheet of a company must, by S. 129, be signed, on behalf of the Board, by two of the Directors, or by the sole Director; the Auditors' Report must be attached to the Balance Sheet, and such Report must be read before the company in general meeting, and must be open to inspection by any member.

In the case of a *banking company* registered after the 15th August, 1879, the Balance Sheet must be signed by the Secretary or Manager, if any, and where there are more than three Directors, by at least three of them, and where there are not more than three, by all the Directors.

If any copy of the Balance Sheet which has not been properly signed is issued, circulated or published, or without having a copy of the Auditors' Report attached to it, the company, and every Director, Manager, Secretary or other Officer who is knowingly a party to the default will be liable to a fine not exceeding £50.

#### § 4.—Particulars as to Subsidiary Companies.

In view of the modern tendency to evolve ever larger industrial units and of the increasing number of "holding" companies—i.e. companies which control the operations of subsidiary companies through the holding of shares and the exercise of voting power thereby conferred—it has become necessary to protect the interests of "outside" shareholders and to enforce provisions as to the published accounts of both holding and subsidiary companies.

As mentioned briefly above, S. 125 provides that:—

Where any of the assets of a company consist of shares in, or amounts owing (whether on account of a loan or otherwise) from, a subsidiary company or subsidiary companies, the aggregate amount of those assets, distinguishing shares and indebtedness, must be set out in the Balance Sheet of the holding company separately from all its other assets; and where the holding company is indebted (whether on account of a loan or otherwise) to one or more subsidiary companies, the aggregate amount of that indebtedness must be set out in the Balance Sheet of the holding company separately from all its other liabilities.

In regard to the treatment of profits and losses of subsidiaries, there was formerly a danger that profits would be brought to credit whilst losses were ignored, i.e. that dividends from subsidiaries would be used to enable the holding company itself to pay dividends, without regard to the diminished value of shares held in subsidiaries which had suffered even substantial losses. This position is dealt with by S. 126 along the following lines:—

(1) Where a holding company holds shares, either directly or through a nominee, in one or more subsidiary companies, a statement must be annexed to the holding company's Balance Sheet, signed by the same persons, stating how the profits and losses of a subsidiary, or the aggregate profits and losses where there are two or more subsidiaries, have been dealt with in, or for the purposes of, the accounts of the holding company; and, in particular, how, and to what extent:—

- (a) provision has been made for the losses of a subsidiary, either in its accounts or those of the holding company, or of both; and
- (b) losses of a subsidiary have been taken into account by the Directors of the holding company in arriving at the profits and losses of the holding company *as disclosed in its accounts*:

Provided that it is not necessary to specify the *actual* profit or loss of any subsidiary, or the actual amount of any part of any such profits or losses which has been dealt with in any *particular manner*.

(2) If, in the case of a subsidiary, the Auditors' Report is not "without qualification" (i.e. if they are unable to give a "clean" report in the usual statutory form laid down by S. 134 (1) of the Act, as to which see § 8), the statement to be annexed as stated in (1) must contain "particulars of the manner in which the Report *is* qualified."

(3) For the purposes of this section, the profits or losses of a subsidiary mean those shown in any accounts made up by it to a date within the holding company's Accounting Period; or, if no accounts of the subsidiary are available at the time when the accounts of the holding company are made up, the profits or losses shown in the last previous accounts of the subsidiary which became available within that period.

(4) If for any reason the Directors of the holding company are unable to obtain the information necessary for the preparation of the statement aforesaid, those who sign the Balance Sheet must so report in writing, which report must be annexed to the Balance Sheet in lieu of the statement.

An example of a statement published in accordance with the requirements of the above section is as follows:—

STATEMENT REQUIRED BY S. 126 OF THE COMPANIES  
ACT, 1929.

The profits of Subsidiary Companies for the year ended December 31st last have been included in the Profit and Loss Account to the extent of Dividends declared, so far as such dividends relate to this Company's shareholdings.

The Auditors' Reports upon the Accounts of Subsidiary Companies contain the following qualifications, viz.:—

.....Co. Ltd.

Subject to the sufficiency of the provision for Depreciation and Renewals.

.....Co. Ltd.

Nothing has been added to Reserve for Reconstruction and Renewals during the year.

.....	}	Directors [signing the
.....	}	Balance Sheet].

Such statement need not be in "report" or any other particular form, so long as it is signed by the same persons who sign the holding company's Balance Sheet. Indeed, although the Section states that the statement must be "annexed" to the Balance Sheet, the requirements could probably be met by including it as a note on the face of the Balance Sheet, the signatures in that event holding good for the complete document. But inclusion in the Balance Sheet would be open to objection on the part of the Auditors of the company, in that it might fasten on them the responsibility for the accuracy of the statement.

Since the object of S. 126 is to protect shareholders (and thus creditors also) of the holding company, by preventing its profits or position from being overstated as a result of ignoring the losses of other concerns in which it has invested capital, it is but logical that the expression "subsidiary company" should be defined on broad commercial principles. Thus, a subsidiary need not be a company registered in Great Britain, or even have established a place of business here; if it has lost money, it does not matter where it has been lost. Whether the holding company exercises control through its shareholding and voting

power, or the right to appoint the majority of the Directors of the subsidiary, is also of minor importance. On the other hand, where a money-lending company holds shares in another company as *security* only, it cannot be contended that the relation of holding company and subsidiary has been established. S. 127 deals with these matters, as follows:—

(1) Where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee, and whether that other company is a company within the meaning of this Act or not, and—

(a) the amount of the shares so held is, *at the time when the accounts of the holding company are made up*, more than 50% of the issued share capital of that other company, or such as to entitle the company to more than 50% of the voting power in that other company; OR

(b) the company has power (not being power vested in it by virtue only of the provisions of a debenture trust deed, or by virtue of shares issued to it for the purpose in pursuance of those provisions), directly or indirectly, to appoint the majority of the directors of that other company,

that other company shall be deemed to be a subsidiary company within the meaning of this Act, and the expression “subsidiary company” in this Act means a company in the case of which the conditions of this section are satisfied.

(2) Where a company, the ordinary business of which includes the lending of money, holds shares in another company as security only, no account shall, for the purpose of determining under this section whether that other company is a subsidiary company, be taken of the shares so held.

### § 5.—Particulars as to Loans to and Emoluments of Directors, etc.

Within recent years, a number of complaints have been made by shareholders of none-too-prosperous companies that the Directors’ Fees have been very heavy and/or have not been disclosed on the face of the published accounts. The arguments are naturally of greater strength where the officials appear to do little more than attend board meetings, i.e. are not managing or salaried employees.

Directors are agents of the company, and in certain respects trustees also (though not for the individual shareholders); they are paid servants of the company; because of their fiduciary relationship with the company, it is right and proper that any loans made to them, whether repaid or outstanding at the date of any Balance Sheet of the company, should be clearly stated in the Accounts. Small loans to employees are in a somewhat different category, although these should not be described as or grouped with ordinary debtors.

S. 128 makes the following provisions in respect of these matters:—

(1) The accounts which in pursuance of this Act are to be laid before every company in general meeting shall, subject to the provisions of this Section, contain particulars showing—

- (a) the amount of any loans which during the period to which the accounts relate have been made either by the company or by any other person under a guarantee from or on a security provided by the company to any director or officer of the company, including any such loans which were repaid during the said period; and
- (b) the amount of any loans made in manner aforesaid to any director or officer at any time before the period aforesaid and outstanding at the expiration thereof; and
- (c) the total of the amount paid to the directors as remuneration for their services, inclusive of all fees, percentages, or other emoluments, paid to or receivable by them by or from the company or by or from any subsidiary company.

(2) The provisions of subsection (1) of this Section with respect to loans shall not apply—

- (a) in the case of a company the ordinary business of which includes the lending of money, to a loan made by the company in the ordinary course of its business; or
- (b) to a loan made by the company to any employee of the company if the loan does not exceed two thousand pounds and is certified by the directors of the company to have been made in accordance with any practice adopted or about to be adopted by the company with respect to loans to its employees.

(3) The provisions of subsection (1) of this Section with respect to the remuneration paid to directors shall not apply in relation to a managing director of the company, and in the case of any other director who holds any salaried employment or office in the company there shall not be required to be included in the said total amount any sums paid to him except sums paid by way of directors' fees.

(4) If in the case of any such accounts as aforesaid the requirements of this Section are not complied with, it shall be the duty of the auditors of the company by whom the accounts are examined to include in their report on the balance sheet of the company, so far as they are reasonably able to do so, a statement giving the required particulars.

(5) In this Section the expression "emoluments" includes fees, percentages and other payments made or consideration given, directly or indirectly, to a director as such, and the money value of any allowances or perquisites belonging to his office.

It must be observed that the reference is to the "accounts"; the particulars as to loans should normally appear as details in the Balance Sheet, and those as to emoluments in the Profit and Loss Account; the Auditors are made responsible for the conclusiveness of the particulars to be given in compliance with the Section.

## **§ 6.—Appointment and Remuneration of Auditors.**

S. 132 provides for the appointment and remuneration of auditors as follows:—

(1) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(2) If an appointment of auditors is not made at an annual general meeting, the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year.

(3) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a member to the company

not less than fourteen days before the annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to the members, either by advertisement or in any other mode allowed by the articles, not less than seven days before the annual general meeting:

Provided that if, after notice of the intention to nominate an auditor has been so given, an annual general meeting is called for a date fourteen days or less after the notice has been given, the notice, though not given within the time required by this subsection, shall be deemed to have been properly given for the purposes thereof, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this subsection, be sent or given at the same time as the notice of the annual general meeting.

(4) Subject as hereinafter provided, the first auditors of the company may be appointed by the directors at any time before the first annual general meeting, and auditors so appointed shall hold office until that meeting:

Provided that—

- (a) the company may at a general meeting of which notice has been served on the auditors in the same manner as on members of the company remove any such auditors and appoint in their place any other persons being persons who have been nominated for appointment by any member of the company and of whose nomination notice has been given to the members of the company not less than seven days before the date of the meeting; and
- (b) if the directors fail to exercise their powers under this subsection, the company in general meeting may appoint the first auditors, and thereupon the said powers of the directors shall cease.

(5) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors, if any, may act.

(6) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of an auditor appointed before the first annual general meeting, or of an auditor appointed to fill a casual



vacancy, may be fixed by the directors, and that the remuneration of an auditor appointed by the Board of Trade may be fixed by the Board.

S. 133 further provides that:—

(1) None of the following persons shall be qualified for appointment as auditor of a company—

- (a) a director or officer of the company;
- (b) except where the company is a private company, a person who is a partner of or in the employment of an officer of the company;
- (c) a body corporate.

Subsection (2) makes any body corporate acting as auditor to a company liable to a fine not exceeding £100, and ss. (3) excludes *a firm* from the expression “body corporate” in the application of the section to Scotland.

### § 7.—Auditors’ Rights of Access to Books.

Every Auditor of a company is, by S. 134 (2), given the right of access at all times to the books and accounts and vouchers of the company, and is also entitled to require from the Directors and officers of the company such information and explanation as may be necessary for the performance of his duties.

An exception is made in the case of banking companies registered after the 15th August, 1879, which have branch banks beyond the limits of *Europe* (not Great Britain, as many persons erroneously understand). In such cases it is sufficient if the Auditor be allowed access to such copies and extracts from such books and accounts of any such branch as have been transmitted to the head office of the company in Great Britain.

### § 8.—What the Auditors’ Report Must State.

By S. 134 (1), the Auditors must make a Report to the members on the accounts examined by them, and on every Balance Sheet laid before the company in general meeting during their tenure of office.

The Report must state—

- (a) whether or not they have obtained all the information and explanations they have required; and
- (b) whether, in their opinion, the Balance Sheet referred to in the Report is properly drawn up so as to exhibit a

true and correct view of the state of the company's affairs, according to the best of their information and the explanations given to them, and as shown by the books of the company.

It was held in *re Allen Craig & Co. (London) Ltd.* [1934] Ch. 483, that the duty of the auditor under S. 134 is confined to forwarding the report to the secretary of the company, leaving to the secretary or the directors the duty of convening a meeting to consider the report.

### § 9.—Auditors Entitled to Attend General Meetings.

By S. 134 (3), the Auditors are entitled to attend any general meeting at which any accounts of the company which have been examined or reported on by them are to be laid before the company, AND—a very important right in certain cases, e.g. where new information may have come to their notice since the accounts were reported upon—to make any statement or explanation they desire with respect to the accounts.

### § 10.—Investigation of Company's Affairs by Inspectors.

Where for any reason a body of shareholders desires to have an investigation made into the affairs of a company, the Act provides for the appointment of one or more Inspectors for this purpose, and gives them the power to examine on oath the officers and agents of the company in relation to its business, and to require such persons to produce all books and documents in their custody or power (refusal being punishable as contempt of court).

There are two modes of procedure:—

- (1) The company may itself pass a Special Resolution which appoints Inspectors. Such Inspectors must then report "in such manner and to such persons as the company in general meeting may direct" (S. 137), e.g. to a small committee of shareholders.
- (2) The required proportion or number of persons [see below] may apply to the Board of Trade, showing good cause and giving security (not exceeding £100), to make the appointment. In this case, the Inspectors report thereon to the Board of Trade, and the Board must, in

addition to forwarding a copy to the company at its registered office, deliver a further copy to the *applicants* for the investigation at their request (S. 135).

In an exceptional case, the second method may be more speedy, but the first method enables the contents of the report to be kept *more secret*, and may be less harmful to the real interests of the company and its shareholders.

Where the report is made to the Board of Trade, and it appears that any person has been guilty of an offence in relation to the company for which he is criminally liable, the Board must refer the matter to the Director of Public Prosecutions (in Scotland, the Lord Advocate), who may institute proceedings accordingly and examine agents (including bankers, solicitors and auditors of the company in this case) and officers of the company (S. 136).

The application to the *Board of Trade* must (S. 135) be made by:—

- (i) Members holding not less than *one-third* of the shares issued in the case of a *banking company* having a share capital.
- (ii) Members holding not less than *one-tenth* of the shares issued in the case of *any other company* having a share capital.
- (iii) Not less than *one-fifth* in number of the *persons* on the register of a company not having a share capital.

## ABSTRACT OF CHAPTER XII

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### PRIVATE COMPANIES

- § 1.—DEFINITION OF PRIVATE COMPANY.
- § 2.—WHAT IS AN INVITATION TO THE PUBLIC?
- § 3.—THE PRIVILEGES OF PRIVATE COMPANIES.
- § 4.—CERTIFICATES IN ANNUAL RETURN.
- § 5.—LOSS OF PRIVILEGES AND EXEMPTIONS.
- § 6.—CARRYING ON BUSINESS WITH LESS THAN TWO MEMBERS.

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## CHAPTER XII

# PRIVATE COMPANIES

### § 1.—Definition of Private Company.

Where a “one-man” or a family business is converted into a company limited by shares, it may seek to enlarge its capital, but will normally not find it necessary to invite the general public to subscribe for its shares or debentures.

Occasionally, friends of the proprietor(s) will be offered some shares, or persons requiring employment may be required to make an investment. Invitations of this kind will not usually constitute a prospectus, or be issued as such. In any event, the number of shareholders will be quite small, even including employees, and transfers of shares will probably be restricted, e.g. to members of the family, or widows of employees, with a view to keeping the affairs of the company as confidential as is practicable.

The law recognises these facts, and confers on “private” companies a number of useful privileges so long as they continue to comply with this definition, laid down by S. 26 (1):—

The expression “private company” means a company which *by its Articles*—

- (a) restricts the right to transfer its shares; and
- (b) limits the number of its members to 50, *not including* persons who *are* in the employment of the company, and persons who, having been formerly in the employment of the company, were while in that employment, and have continued after the determination of that employment to be, members of the company; and
- (c) prohibits any invitation to the public to subscribe for any shares *or debentures* of the company.

For the purposes of this definition, joint holders of shares are to be treated as a single member.

## § 2.—What is an Invitation to the Public?

It is not always easy to determine what amounts to an "invitation to the public." An invitation to a *limited class* of persons, e.g. shareholders in a certain class of companies, even where marked "for private circulation only," may (as in *South of England Natural Gas Co.* [1911] 1 Ch. D. 57) be held to be made to the public. One clear fact is that the invitation must be made by the company *itself*.

**Sherwell v. Combined Mantles Syndicate** [1907] W.N. 10. Several hundred copies of a prospectus marked "Strictly Private and Confidential. Not for Publication." were, without the company's authority, printed by its Directors and circulated among their friends. It was HELD that this did not constitute an invitation to the public, as it was not an offer—

- (a) by the company itself; nor
- (b) to any person who chose to come in and take the shares.

However, each case must depend upon its exact circumstances.

Other decisions on this matter have been considered in Chap. V, § 1, to which reference should be made.

## § 3.—The Privileges of Private Companies.

As compared with a public company, a private company enjoys the understated privileges, so long as it complies strictly with the requirements of the Act as stated in the definition given above.

- (1) *Number of Members.* May be 2 only [instead of a minimum of 7 as required in the case of any other company] (S. 1(1) and S. 28).
- (2) *Number of Directors.* S. 139 (1), requiring that every company registered after 1st November, 1929, must have at least 2 Directors, does *not* apply to a private company (ss. (2)).
- (3) *Appointment of Directors.* The restrictions on the appointment of Directors imposed by S. 140 [see Ch. X, § 2] do *not* apply to a private company, *nor* (in this case) to a company which was a private company before becoming a public company (ss. (4)).
- (4) *Commencement of Business.* The restrictions on the commencement of business do *not* apply (S. 94 (7)). A private company can commence business as soon as a certificate of incorporation has been issued.

- (5) *Allotment—Minimum Subscription.* The provisions of S. 39, as to the minimum subscription being received before any shares are allotted, deal with offers to the public, and so do *not* apply to private companies.
- (6) *Statement in Lieu of Prospectus.* A private company is *not* required to file any such statement (S. 40 (2)).\*
- (7) *Statutory Meeting.* A private company need *not* hold a statutory meeting, or, consequently, forward or file a statutory report (S. 113 (10)).
- (8) *Quorum.* In the case of a private company, in so far as its Articles do not otherwise provide, 2 members personally present form a quorum [instead of 3 members in the case of other companies] (S. 115 (1)).
- (9) *Auditors.* In the case of a private company, a person who is a partner of, or in the employment of, an officer of the company is capable of being appointed the auditor (S. 133(1)).
- (10) *Copies of Balance Sheet.* Although members of a private company are entitled to be furnished with a copy of the Balance Sheet and Auditors' Report within 7 days of request, at a charge not exceeding 6d. for every 100 words, copies need not be sent out before the general meeting or supplied free (S. 130).
- (11) *Annual Return—Balance Sheet.* The annual return of a private company need *not* include the certified copy of the last audited Balance Sheet, or annexed documents or of the Auditors' Report which is required in the case of a public company (S. 110 (3)).

#### § 4.—Certificates in Annual Return.

A *private* company must (S. 111) send with its annual return:

- (a) a Certificate that the company has not—
  - (i) in the case of the *first* return, since the date of the incorporation;

\* **NOTE**—Where any commission is payable in respect of subscribing for or underwriting shares, the amount or rate per cent. thereof must be disclosed in any circular or notice, and in a statement in the prescribed form to be filed (before payment) with the Registrar (S. 43 (1)).



- (ii) in subsequent cases, since the date of the last return;

issued any invitation to the public to subscribe for any shares or debentures of the company; and

- (b) IF the annual return discloses the fact that the number of members exceeds 50, a Certificate that the *excess* consists wholly of persons who are present employees, or past employees who have continued to be members, and so are not to be included in reckoning the number of 50.

Such Certificates must be signed by a Director or the Secretary of the company.

### § 5.—Loss of Privileges and Exemptions.

If a “private” company (as defined by S. 26) alters its Articles in such a manner that they no longer include the statutory provisions, it ceases to be a private company as on the date of such alteration.

Further, in any such case, it must, within 14 days after the date of such alteration, deliver for registration to the Registrar of Companies one of the following documents:—

- (a) a Prospectus; or
- (b) a Statement in lieu of Prospectus, in the special form set forth in the Third Schedule to the Act [see Appendix III].

The default fine is £50 (S. 27).

Consequently, the alteration of the Articles is the simplest mode of converting a private to a public company.

If, on the other hand, the private company does not alter its Articles, but fails to comply with the statutory requirements, then—unless the Court is satisfied that the failure was accidental, or due to inadvertence or some other sufficient cause, or that it is otherwise just and equitable to grant relief—the company will (S. 27(3)) cease to be entitled to the privileges and exemptions conferred on private companies under the following provisions:—

- S. 28. As to the minimum number of members (see below).

- S. 110 (3). As to the annual return including a copy of the last audited Balance Sheet, etc.
- S. 130 (1). As to circulation of copies of the Balance Sheet before the general meeting and the supplying of free copies to all members on request.
- S. 168, para (4). As to winding up by the Court where the number of members falls below 2 or 7.

**§ 6.—Carrying on Business with less than Two Members.**

If at any time the number of members of a company is reduced—

- (a) in the case of a private company, below two; or
- (b) in the case of any other company [e.g. a private company which loses its privileges] below seven;

and it carries on business for more than 6 months while the number is so reduced, every person who is a member during the time that the company carries on business AFTER THOSE 6 MONTHS and is cognisant of the fact that it is carrying on business with less than the legal minimum of members will be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor (S. 28).



ABSTRACT OF CHAPTER XIII

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**GUARANTEE, UNLIMITED AND  
OTHER SPECIAL COMPANIES**

§ 1.—GUARANTEE COMPANIES.

§ 2.—UNLIMITED COMPANIES.

§ 3.—FOREIGN COMPANIES.

§ 4.—BANKING COMPANIES.

§ 5.—ASSURANCE COMPANIES.



## CHAPTER XIII

# GUARANTEE, UNLIMITED AND OTHER SPECIAL COMPANIES

### § 1.—Guarantee Companies.

Where it is desired to form a limited liability company for some purpose which does not require a large capital, it is frequently advantageous to limit the liability of the members by guarantee. Each member, upon joining the company, will undertake to contribute not more than a specified maximum sum towards the company's assets in the event of the company being wound up, but no member can be called upon unless and until a winding-up commences. Occasionally these companies have small share capitals, the shares being held by a few of the members, but where capital is necessary, it is more usual to raise it by means of loans or levies.

The Memorandum of a company limited by guarantee must state that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year after he ceases to be a member, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount (S. 2 (3)).

The Articles must state the number of members with which the company proposes to be registered, and any increase in membership beyond the registered number must be notified to the Registrar of Companies within 15 days (S. 7).

If the company has a share capital, this also must be included in the Memorandum, wherefore a guarantee company originally formed with no share capital cannot issue shares without altering its Memorandum (S. 2 (4)).

If there is no share capital, no person who is not a member, may participate in the divisible profits of the company (S. 21)

## § 2.—Unlimited Companies.

In the case of an unlimited company, i.e. a company in which the members are fully liable for the company's debts, the amount of the share capital must be stated in the Articles instead of in the Memorandum (S. 7 (1)).

Such a company may register as a limited company by complying with all the formalities which must be observed upon the original registration of a limited company. The Registrar may, however, dispense with the re-registration of documents with which he has been furnished already, but the new registration will not in any way affect the rights and liabilities of the company in respect of debts incurred or contracts entered into before the new registration (S. 16).

Furthermore, on a resolution to register as a limited company, an unlimited company having a share capital may:—

- (1) Increase its nominal capital by increasing the nominal amount of each share, provided that no part of the increased capital shall be capable of being called up except in the event and for the purposes of winding-up.
- (2) Provide that a specified portion of the uncalled capital shall not be capable of being called up except in the event and for the purposes of a winding-up (S. 53).

## § 3.—Foreign Companies.

The following provisions of the Act apply to companies incorporated outside Great Britain which have established places of business within Great Britain.

- (1) Where any such company establishes a place of business within Great Britain after the 1st November, 1929, it must, within one month of the establishment, deliver to the Registrar of Companies:—
  - (a) a certified copy of the Charter, Statutes or Memorandum and Articles of the company, or other instrument constituting or defining the constitution of the company, and if the instrument is not written in the English language, a certified translation thereof;

- (b) a list of the directors of the company containing such particulars with respect to the directors as are by the Act required to be contained with respect to directors in the register of the directors of a company;
  - (c) the names and addresses of some one or more persons resident in Great Britain authorised to accept on behalf of the company service of process and any notices required to be served on the company (S. 344 (1)).
- (2) These particulars must also be filed before 1st December, 1929, by:—
  - (a) companies incorporated outside Great Britain which established places of business in Great Britain before the 1st April, 1909, and having places of business in Great Britain at the commencement of the Act (1st November, 1929);
  - (b) companies incorporated in Northern Ireland before the 1st January, 1922, which have places of business in Great Britain at the 1st November, 1929;
  - (c) companies incorporated in the Irish Free State which established places of business in Great Britain before the 27th March, 1923, and have places of business in Great Britain at the 1st November, 1929 (S. 344 (2)).
- (3) Any other companies incorporated out of Great Britain and having places of business in Great Britain at the commencement of the Act must, if at the 1st November, 1929, they have not filed with the Registrar the documents and particulars specified in S. 274 (1) (a), (b) and (c), Companies (Consolidation) Act, 1908, as amended by the Companies (Particulars as to Directors) Act, 1917, file those documents and particulars in accordance with the said Acts (S. 344 (3)).
- (4) Any alteration in the documents or particulars filed must be communicated to the Registrar (S. 346).



- (5) Every such company must in every calendar year make out a Balance Sheet in accordance with the provisions of the Act, and must file a copy with the Registrar (S. 347).
- (6) Every such company must also:
  - (a) in every prospectus inviting subscriptions for its shares or debentures in Great Britain state the country in which the company is incorporated; and
  - (b) conspicuously exhibit on every place where it carries on business in Great Britain the name of the company and the country in which the company is incorporated; and
  - (c) cause the name of the company and of the country in which the company is incorporated to be stated in legible characters in all bill-heads and letter paper, and in all notices, advertisements, and other official publications of the company; and
  - (d) if the liability of the members of the company is limited, cause notice of that fact to be stated in legible characters in every such prospectus as aforesaid and in all bill-heads, letter paper, notices, advertisements, and other official publications of the company in Great Britain, and to be affixed on every place where it carries on its business (S. 348).
- (7) Companies incorporated in the Channel Islands or the Isle of Man with places of business in England or Scotland must register all the documents and particulars which are required to be registered by companies incorporated in England or Scotland (S. 353).
- (8) Every company incorporated outside England with a place of business in England must comply with the provisions of Ss. 79 to 91 of the Act, i.e. the provisions as to the registration of mortgages and charges (S. 90).

#### § 4.—Banking Companies.

In general, all the ordinary provisions of the Act apply to companies formed to transact banking business, but the

following special rules are laid down for banking companies only:—

- (1) An association of more than ten persons formed to carry on the business of banking must be incorporated as a company (S. 358).
- (2) If any banking company which was in existence on the 7th August, 1862, proposes to register as a limited company, thirty days notice of the intention to register must be given to every person who has a banking account with the company (S. 359).
- (3) A banking company which issues bank notes is not entitled to limited liability as regards the notes (S. 360).
- (4) Certain privileges are enjoyed by banking companies which file annual returns under S. 108 (S. 361).

#### § 5.—Assurance Companies.

Companies which transact life, fire, accident, and employers' liability insurance and bond investment business are subject to the provisions of the ASSURANCE COMPANIES ACT, 1909, as well as to those of the Companies Act, 1929. Under the Assurance Companies Act, 1909, such companies must present their ACCOUNTS IN STATUTORY FORM as prescribed by the Act, and where this is done, the Annual Return to be filed under S. 108, Companies Act, 1929, need not be accompanied by a certified copy of the Balance Sheet, since a Balance Sheet must be filed under the Act of 1909 (S. 110 (3)).



## ABSTRACT OF CHAPTER XIV

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### WINDING UP BY THE COURT: PROCEEDINGS UP TO AND INCLUDING THE ORDER

- § 1 —INTRODUCTORY SUMMARY
- § 2.—THE PETITION.
- § 3 —TO WHAT COURT A PETITION SHOULD BE PRESENTED.
- § 4 —WHO MAY PRESENT A PETITION.
- § 5 —PETITIONS BY THE COMPANY.
- § 6 —PETITIONS BY CONTRIBUTORIES.
- § 7 —PETITIONS BY CREDITORS.
- § 8.—PETITIONS BY THE OFFICIAL RECEIVER.
- § 9.—HEARING THE PETITION.
- § 10.—GROUNDS FOR MAKING A WINDING UP ORDER
- § 11 —APPOINTMENT OF A PROVISIONAL LIQUIDATOR.
- § 12 —STAY OF PROCEEDINGS.
- § 13 —THE WINDING UP ORDER.



## CHAPTER XIV

# WINDING UP BY THE COURT: PROCEEDINGS UP TO AND INCLUDING THE ORDER

### § 1.—Introductory Summary.

It is proposed, in this chapter, to deal in detail with the procedure to be followed up to the making of a Winding Up Order, subject to such digressions as may be necessary in order to solve problems encountered on the way.

An order for the compulsory winding up of a Company is obtained by presenting a Petition to the appropriate Court praying the Court to make a Winding Up Order. The Registrar of the Court fixes a day for Hearing the Petition and if good grounds for the winding up of the Company are adduced, the Order asked for will be made. In general, there is little delay in Hearing the Petition, but occasionally, e.g. where the Petition is presented in vacation time, it is necessary to obtain from the Court interim orders for the protection of the Company's assets, and for this purpose a Provisional Liquidator may be appointed before a Winding Up Order has been made.

### § 2.—The Petition.

A Petition for a Winding Up Order must be drawn up in the form prescribed by the Companies (Winding Up) Rules, 1929 (Form 4 or 5). It must contain the name of the Company to be wound up, the date of incorporation, the address of the registered office, the amount of the nominal and paid up capital, the objects of the Company and the grounds on which the application is being made (Rule 25).

The Petition must be presented to the Registrar of the Court to which it is addressed, together with sealed copies which are to be served on the Company and (if the Company is already in voluntary liquidation) on the Liquidator thereof.

Service on the Company must be made at the registered office or (if there is no registered office) at the principal or last known principal place of business (Rule 28 and Form 7).

On being presented with the Petition, the Registrar of the Court fixes a time and place for the Hearing and endorses the Petition and the sealed copies with notice of these (Rule 26).

The Petition must, in addition to being served on the Company and the Liquidator, be advertised (Form 6) in *The London Gazette* at least seven clear days before the day fixed for the Hearing, and in:—

- (a) one London daily morning paper, where the registered office or last known principal place of business is or was situated within ten miles of the entrance of the Royal Courts of Justice; or
- (b) one local newspaper circulating in the district in which the registered office or last known principal place of business is or was situated, in any other case; or
- (c) such other newspaper as the Court directs (Rule 27).

In addition, every contributory and every creditor of the Company is entitled to a copy of the Petition on payment of a fee of not more than 4d. per folio of 72 words, and such copies must be supplied by the petitioner's solicitor within 24 hours of a request therefor (Rule 30).

Finally, within four days after the presentation of the Petition to the Registrar of the Court, the petitioner must file an affidavit verifying the statements contained therein (Rule 29: Forms 9 and 10).

### § 3.—To What Court a Petition should be Presented.

It is advisable to present the Petition to the proper Court, as, if the wrong Court is petitioned, delay will probably result; but proceedings are not invalidated by reason that they are taken in a wrong Court (S. 163 (7)), and in such a case they may, at the discretion of the judge, be continued in the wrong Court or on payment of costs transferred to another Court at any time or at any stage and either with or without the application of a party to the proceedings (S. 165 (1)).

In determining what Court should be petitioned, the following rules must be borne in mind:—

1. The High Court has power to order the winding up of any Company registered in England (S. 163 (2)).
2. Concurrent jurisdiction is enjoyed by:—
  - (a) the Chancery Courts of the Counties Palatine of Lancaster and Durham, where the registered office of a Company is situated in one of these counties (S. 163 (2));
  - (b) the County Court, where the registered office is situated out of the London bankruptcy area *and* the paid-up capital does not exceed £10,000 (S. 163 (3));
  - (c) the Stannaries Court, where a Company is formed for working mines within the Stannaries (S. 163 (4)).

For the purposes of a winding up each of these Courts has all the powers of the High Court (S. 163 (6)); but if any question arises in any winding up proceedings in a County Court which all the parties to the proceedings, or which one of them and the judge of the Court, desire to have determined in the first instance by the High Court, the judge is required to state the facts in the form of a special case for the opinion of the High Court (S. 165 (3)).

But where winding up proceedings have been commenced in or transferred to the High Court, the judge has power to order the transfer to him of any action pending in any other Court or Division by or against the Company (Rule 42). And any action by a mortgagee or debenture-holder against the Company, for the purpose of realising his security, or by any other person for the purpose of enforcing a claim against the Company's assets, is automatically transferred without further order, if it is pending in any other Division of the High Court (*ibid.*).

#### § 4.—Who May Present a Petition.

A Petition for a Winding Up Order may be presented by:—

- (a) the Company itself;
- (b) a contributory or contributories;



- (c) a creditor or creditors;
- (d) the Official Receiver.

### § 5.—Petitions by the Company.

A Company does not often present a Petition to have itself wound up by the Court as, where a Company is anxious to be wound up, it can achieve its object more conveniently by passing a resolution to wind up voluntarily. But, if the Company in general meeting resolves that it shall be wound up by the Court, the directors may present a Petition for a Winding Up Order (*Galway and Salthill Tramways Co.* [1918] I.R. 62). A Special Resolution is advisable (S. 168 (1)), but not essential if there are independent grounds on which a Winding Up Order may be made.

### § 6.—Petitions by Contributories.

A contributory cannot present a Petition unless:—

- (a) the number of members has fallen below 7 (or 2 in the case of a private Company); or
- (b) shares have been held by him and registered in his name for at least 6 out of the previous 18 months; or
- (c) he is the original allottee of the shares; or
- (d) the shares have devolved on him through the death of the former holder (S. 170 (1)).

But, where the husband of a female contributory is himself a contributory, if shares have been held by or registered in the name of the wife or of a trustee for the wife or the husband for 6 out of the previous 18 months, they shall be deemed to have been held by or registered in the name of the husband (S. 170 (3)).

The term “contributory” includes, for this purpose, the holder of fully-paid shares (*National Savings Banks Association* [1866] 1 Ch. 547); but not the holder of share warrants to bearer (*Walu Wynaad & Co.* [1882] 21 Ch. 849); and if the petition is by a holder of fully paid shares an order will be refused unless it appears that there will be a surplus of assets over liabilities (*Rica Gold Co.* [1879] 11 Ch. D. 36).

In general, the Courts will not make a Winding Up Order on the Petition of a contributory where the Company is already being wound up voluntarily (*London and Mercantile Discount Co.* [1866] 1 Eq. 277); but an order may be made if the majority which resolved to wind up voluntarily did not fairly represent the shareholders (*Varieties Ltd.* [1893] 2 Ch. 235).

In any case, the Court must be satisfied that the Voluntary Winding Up cannot be continued with due regard to the interests of the contributories (S. 170 (2)). The holder of shares with calls in arrear will rarely be allowed to petition, unless he first pays the arrears into Court (*Crystal Reef Gold Mining Co.* [1892] 1 Ch. 408).

### § 7.—Petitions by Creditors.

Any creditor who is able to satisfy the Court that there are good grounds for a Winding Up Order is *prima facie* entitled to an Order; but the Court may refuse the Order if it is not likely to benefit the majority of the creditors (*Greenwood & Co.* [1900] 2 Q.B. 306), or if the Petition is opposed by a majority in value of the creditors (*Chapel House Colliery Co.* [1883] 24 Ch. D. 259). And it may insist that the Company be given an opportunity to pay its debts (*Brighton Hotel Co.* [1868] L.R. 6 Eq. 339). But an Order cannot be refused on the ground that there are no assets (S. 171 (1)), or that the Company is already being wound up voluntarily (*Haycroft Gold Reduction Co.* [1900] 2 Ch. 230).

The term "creditor" includes for this purpose the assignee of a debt (*Paris Skating Rink Co.* [1877] 5 Ch. D. 959), and the equitable mortgagee of debentures (*Olathe Silver Mining Co.* [1884] 27 C.D. 278); but it does not include a garnishor (*Combined Weighing Machine Co.* [1890] 43 C.D. 99) or a creditor for unliquidated damages (*Pen-y-Van Colliery Co.* [1877] 6 C.D. 477).

A secured creditor may petition notwithstanding that a receiver has been appointed (*Borough of Portsmouth Tramways Co.* [1892] 2 Ch. 362); but not if the debt is payable to trustees under a trust deed for securing debenture stock (*Uruguay Central Railway Co.* [1879] 11 Ch. D. 372), as there is no direct relationship of debtor and creditor.

A Petition may even be presented by a contingent or prospective creditor (S. 170 (1)); but in such a case the petitioner must give security for the costs and establish a *prima facie* case for winding up before the hearing (*ibid.*).

### § 8.—Petitions by the Official Receiver.

Where a Company is being wound up voluntarily or subject to supervision in England, the Official Receiver may present a Petition for a Winding Up Order; but in such a case no Order may be made unless the Court is satisfied that the Voluntary or Supervision Winding Up cannot be continued with due regard to the interests of the creditors or contributories (S. 170 (2)).

### § 9.—Hearing the Petition.

The Registrar of the Court, when the Petition is presented, appoints a day whereon the petitioner or his solicitor is required to attend him at his office to satisfy him that the Rules as to Petitions have been complied with (Rule 32).

Any person interested may appear at the Hearing of the Petition, which takes place in open Court, but every person intending to appear must serve on or send by post to the petitioner or his solicitor or London agent, notice of his intention to appear (Rule 33). This notice (Form 12) must contain the address of the person intending to appear and must be signed by him or his solicitor or London agent, and must be served or posted so that it arrives at the address stated for the purpose in the advertisement of the Petition, not later than 6 o'clock in the afternoon of the day preceding the day appointed for the Hearing, or if such day is a Monday, not later than 1 o'clock in the afternoon of the preceding Saturday (*ibid.*). A person who does not give this notice cannot appear at the Hearing without the special leave of the Court (*ibid.*). The petitioner or his solicitor or London agent must prepare a list of persons who have given notice of their intention to appear (Form 13), and, on the day appointed for the Hearing, a copy of this list (or, if no person has given notice of his intention to appear, a written statement to that effect) must be handed to the Court before the Petition is heard (Rule 34).

Affidavits in opposition to a Petition must be filed within 7 days of the filing of the affidavit verifying the Petition, and

notice thereof must be given to the petitioner or his solicitor or London agent on the day of the filing (Rule 35). Affidavits in reply to the opposition must be filed within 3 days of this notice (*ibid.*).

As a general rule, if any of the foregoing rules are not observed, no Winding Up Order will be made by the Court; but, where the petitioner:—

- (a) is not entitled to Petition; or
- (b) fails to advertise the Petition; or
- (c) consents to withdraw his Petition or to allow it to be dismissed or the Hearing adjourned; or
- (d) fails to appear at the Hearing; or
- (e) does not apply for an Order;

the Court *may* substitute as petitioner any creditor or contributory who is desirous of prosecuting the Petition (Rule 36). And where the petitioner fails to advertise his Petition, an order to substitute another petitioner may be made in Chambers at any time (*ibid.*).

### § 10.—Grounds for Making a Winding Up Order.

A Winding Up Order may be made by the Court on any of the following grounds:—

(i) *That the Company has by Special Resolution resolved to be wound up by the Court* (S. 168 (1)).

(ii) *That default has been made* (1) *in delivering the Statutory Report to the Registrar of Companies or* (2) *in holding the Statutory Meeting* (S. 168 (2)).

Only a Public Company can be wound up on these grounds and, what is more, no Petition can be presented on these grounds unless:—

- (a) the petitioner is a shareholder; *and*
- (b) at least 14 days have elapsed since the last day on which the meeting ought to have been held (S. 170 (1)).

Moreover, where a Petition is presented on either of these grounds, the Court may, instead of making a Winding Up Order, direct that the Report be delivered or the Meeting held,

and may order the costs to be paid by any persons who are responsible for the default (S. 171 (2)).

(iii) *That the Company has not commenced its business within a year from its incorporation, or has suspended business for a whole year* (S. 168 (3)).

(iv) *That the number of members is reduced below 7 (or 2 in the case of a Private Company)* (S. 168 (4)).

(v) *That the Company is unable to pay its debts* (S. 168 (5)).

For this purpose, a Company is deemed to be unable to pay its debts if:—

- (a) a creditor (by assignment or otherwise) to whom the Company is indebted in a sum exceeding £50 then due, has served on the Company at its registered office a written demand for payment, *and* for 3 weeks thereafter the Company has neglected to pay or to secure or compound for the debt to the reasonable satisfaction of the creditor; or
- (b) in England or Northern Ireland, execution or other process issued on a judgment or order of any Court in favour of a creditor is returned unsatisfied in whole or in part; or
- (c) it is proved to the satisfaction of the Court that, having regard to present and contingent and prospective liabilities, the Company is unable to pay its debts (S. 169).

(vi) *That the Court is of opinion that the winding up of the Company will be just and equitable* (S. 168 (6)).

This last provision gives to the Court an absolute discretion, for it has been established that the Court's power thereunder is not limited to cases *ejusdem generis* those specified in S. 168 (*Sailing Ship "Kentmere" Co.* [1897] W.N. 58).

The following are examples of circumstances in which the winding up of the Companies concerned have been held to be "just and equitable":—

- (1) Where the Company's substratum had gone (*German Date Coffee Co.* [1882] 20 Ch. D. 169).
- (2) Where the Company's object was fraudulent (*T. E. Brinsmead & Sons* [1897] 1 Ch. 45).

- (3) Where there was a complete deadlock between the two director-shareholders (*Yenidje Tobacco Co.* [1916] 2 Ch. 426).
- (4) Where debenture-holders were carrying on the Company's business for their own benefit (*Chic Ltd.* [1905] 2 Ch. 123).
- (5) Where there was on foot a reconstruction scheme which was adverse to the majority of the shareholders (*Consolidated South Rand Mines* [1909] W.N. 66).
- (6) Where a member who held nearly all the shares acted as if the Company's assets were his private property (*Thomson v. Drysdale* [1925] S.C. 311).
- (7) Where in a private company, the share capital of which is so held that it is substantially a partnership, a director has employed irregularities to purport to put himself in complete control, excluding the other director from management (*Davis v. Collett Ltd.* [1935] Ch. 693).

### § 11 —Appointment of a Provisional Liquidator.

Where any lengthy period is likely to separate the presentation of the Petition from the Hearing, and it is thought advisable to control in the meantime the Company's power to dispose of its assets, the Court may appoint a Provisional Liquidator (S. 184 (1)).

Such an appointment may be made at any time after the presentation of a Petition and before a Winding Up Order has been made (S. 184 (2)), and either the Official Receiver or any other fit person may be appointed (*ibid.*). Application for the appointment may be made by summons by a creditor, or a contributory, or the Company, the application to be supported by an affidavit citing the grounds on which the appointment is to be made (Rule 31). The Court, having considered the situation, may refuse to make the appointment at its discretion, and, if an appointment is made, may impose such terms as it thinks fit, and may limit and restrict the powers of the Provisional Liquidator (S. 184 (4); Rule 31).

The powers of a Provisional Liquidator appointed before the making of a Winding Up Order are usually restricted to those of a Receiver only and do not include power to carry

on the Company's business; but provision for such cases is made by S. 209, which enables the Official Receiver when acting as a Liquidator, provisionally or otherwise, to apply to the Court for a Special Manager (*post*, Ch. XV, § 7).

The Provisional Liquidator acts until a Winding Up Order is made; but if no such Order is made, or if an Order is made and rescinded subsequently, or if the proceedings on the Petition are stayed, or if a Supervision Order is made instead of a Winding Up Order, the Provisional Liquidator is entitled to be paid out of the Company's property all costs, charges and expenses properly incurred by him, including such sum as would be payable to the Official Receiver acting as Provisional Liquidator (Rule 31).

### § 12.—Stay of Proceedings.

At any time after a Petition has been presented and before a Winding Up Order has been made, the Company, or a creditor, or a contributory, may apply to the Court for an order staying proceedings or actions pending against the Company, and such an order may be made on such terms as the Court thinks fit (S. 172).

If the proceeding or action concerned is pending in the High Court or the Court of Appeal in England or Northern Ireland, application for a stay must be made to the Court in which the proceeding or action is pending: but, in any other case, application must be made to the Court which has jurisdiction to wind up the Company (*ibid.*).

### § 13.—The Winding Up Order.

On Hearing the Petition the Court may:—

- (a) dismiss it; or
- (b) adjourn the Hearing conditionally or unconditionally; or
- (c) make any interim order; or
- (d) make a Winding Up Order (S. 171).

In the last case, the petitioner and all other persons who have appeared at the Hearing must, on the day following the day on which the Order is made, leave at the office of the

Registrar of the Court all documents required for the purpose of the completion of the Order (Rule 38), which must be in the form prescribed by the Rules.

On the day on which the Order is made, the Registrar of the Court sends notice of the Order to the Official Receiver (Rule 37), and when the Order is completed three sealed copies are sent to the Official Receiver (Rule 41), who causes one of them to be served upon the Company by prepaid letter (*ibid.*) and forwards another to the Registrar of Companies as required by S. 176 of the Act (*ibid.*). The Official Receiver then gives notice of the Order to the Board of Trade (who "gazette" it), and arranges for it to be advertised in a local paper (*ibid.*).





## ABSTRACT OF CHAPTER XV

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### WINDING UP BY THE COURT: PROCEEDINGS UP TO THE APPOINTMENT OF A LIQUIDATOR

- § 1.—INTRODUCTORY SUMMARY.
- § 2.—THE IMMEDIATE EFFECT OF A WINDING UP ORDER.
- § 3.—EFFECT OF WINDING UP ORDER ON THE COMPANY'S CONTRACTS
- § 4.—THE COMMENCEMENT OF THE WINDING UP.
- § 5.—THE OFFICIAL RECEIVER.
- § 6.—GENERAL DUTIES OF THE OFFICIAL RECEIVER.
- § 7.—APPOINTMENT OF A SPECIAL MANAGER.
- § 8.—THE STATEMENT OF AFFAIRS.
- § 9.—THE OFFICIAL RECEIVER'S REPORTS.
- § 10.—PRIVATE AND PUBLIC EXAMINATIONS.
- § 11.—FIRST MEETINGS OF CREDITORS AND CONTRIBUTORIES.



## CHAPTER XV

# WINDING UP BY THE COURT: PROCEEDINGS UP TO THE APPOINTMENT OF A LIQUIDATOR

### § 1.—Introductory Summary.

When a Winding Up Order is made, the Official Receiver acquires the powers of a Liquidator and begins to wind up the Company (assisted sometimes by a Special Manager), continuing so to do until some other person is appointed Liquidator in his place.

After receiving a Statement of Affairs, the Official Receiver summons Meetings of the creditors and the contributories and makes Reports to the Court on the Company's position and, if he thinks it necessary, on the conduct of the Directors and Promoters, who may be examined by the Court in public or in private.

### § 2.—The Immediate Effect of a Winding Up Order.

A Winding Up Order produces the following immediate consequences:—

(a) *The Official Receiver becomes Provisional Liquidator by virtue of his office and continues to act as such until he or another person becomes Liquidator* (S. 185 (1)).

(b) *Any disposition of the property of the Company (including things in action) and any transfer of shares, or alteration in the status of the members of the Company, made after the commencement of the winding up, is rendered void, unless the Court otherwise orders* (S. 173).

This latter rule is analogous to the Bankruptcy doctrine of Relation Back. An example is provided by the case of *re Park Ward & Co.* [1926] Ch. 828, where a debenture-holder lent money to the Company to enable it to pay the wages of its staff, after a Petition had been presented. In the circumstances the Court made an order rendering valid the debenture issued to secure the loan; but, if this order had not been made, the

debenture would have been void under S. 173 of the Act. It is, however, the practice of the Courts to allow payments made in good faith and for value.

(c) *Any attachment, sequestration, distress or execution put in force against the estate or effects of the Company after the Commencement of the winding up is rendered void to all intents* (S. 174).

As a result of this rule, if a landlord levies a distraint for rent after the Commencement of a winding up, when a Winding Up Order is made, he must hand the proceeds of the distraint to the Liquidator. He is, therefore, left with nothing more than a right to prove for his rent as an ordinary unsecured creditor.

A similar rule applies where a judgment creditor levies execution against the Company's property after the Commencement of the winding up, or where an execution levied before the Commencement is not completed until after the Commencement (S. 268). (See Ch XVII, § 22.)

(d) *No action or proceeding may be proceeded with or commenced against the Company, except by leave of the Court and subject to such terms as the Court may impose* (S. 177).

This rule applies also where, although no Winding Up Order has been made, a Provisional Liquidator has been appointed (S. 177).

The Court will usually allow secured creditors to continue proceedings for the enforcement of their security (*Lloyd v. Lloyd & Co.* [1877] 6 Ch. D. 339); but in other cases it is necessary to prove that the settlement of the point at issue is requisite for the purposes of the winding up.

### § 3.—Effect of Winding Up on the Company's Contracts.

The making of a Winding Up Order, by constituting the Official Receiver Provisional Liquidator, terminates the business of the Company as a going concern. With the consent of the Court or the Committee of Inspection, the Liquidator may, however, carry on the business so far as may be necessary for the beneficial winding up thereof (S. 191 (1)), and, if this consent is given, the Liquidator can enforce contracts made before the Commencement of the winding up (*Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* [1884] 9 App. Ca. 434).

The winding up does not necessarily involve a breach of the contract made by the Company, but if it does have this effect, e.g. because of the terms of the contract (*Reigate v. Union Manufacturing Co.* [1918] 1 K.B. 592), or because the Liquidator refuses to carry out the Company's side of the bargain, the other party is entitled to damages, which may be proved in the winding up if they are capable of being fairly estimated (see Ch. XVII, § 6). But, although the winding up does not, of itself, discharge the other party to a contract with the Company, rescission *may* be ordered by the Court upon the application of a person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the Company (S. 267 (5)). And, with the sanction of the Court, the Liquidator may disclaim unprofitable contracts (S. 267 (1), and see Ch. XVI, § 11).

Service contracts are, however, subject to special rules, for a Winding Up Order discharges the Company's servants (*Chapman's Case* [1866] 1 Eq. 346), gives them a right to prove for damages for wrongful dismissal without notice, and releases them from any restrictive covenants in their service contracts (*Measures Bros. v. Measures* [1910] 1 Ch. 336). But if the Liquidator continues to employ the Company's servants, this may constitute a novation and so prevent the servants from recovering damages (*McDowall's Case* [1886] 32 Ch. D. 366).

#### § 4.—The Commencement of a Winding Up.

In the sections quoted above, reference is made to the Commencement of the winding up: an important event for very many reasons.

In general, a Winding Up by the Court is deemed to commence when the Petition is presented (S. 175 (2)); but where a Company first goes into Voluntary Liquidation and a Winding Up Order is made subsequently, the winding up is deemed to have commenced when the Company passed the resolution to wind up voluntarily (S. 175 (1)).

If, therefore, on the 1st March, a Company resolves to wind up voluntarily, and on the 1st April a Petition is presented which results in a Winding Up Order, the date of the Commencement of the winding up by the Court is deemed to be the 1st March and not the 1st April.

### § 5.—The Official Receiver.

The Official Receiver is an officer of the Board of Trade who is attached to the Court and whose duty it is to take part in liquidations and bankruptcies.

In general, the duties imposed by the Act upon the Official Receiver must be performed by the particular Official Receiver who is attached to the Court which is engaged in winding up the Company; but, if the Court is of the opinion that some other arrangement will be more convenient and economical, it may appoint some other officer for the purposes of the particular winding up (S. 180).

Thus, if the High Court in London is winding up a Company with a registered office and principal place of business in Cumberland, the Court can, if it thinks fit, appoint as Official Receiver for the purposes of the winding up in question the Official Receiver attached to the Cumberland County Court.

### § 6.—General Duties of the Official Receiver.

Upon the making of a Winding Up Order, the Official Receiver becomes Provisional Liquidator and as such he continues to act unless and until another Liquidator is appointed (S. 185 (1)).

The creditors and contributories may, if they think fit, apply to the Court for the appointment of another Liquidator, and the Official Receiver must summon meetings of the creditors and contributories in order that their wishes may be ascertained (S. 185 (2)).

If no other Liquidator is appointed, the Official Receiver acts as Liquidator (S. 185 (4)), and if at any time the office of Liquidator falls vacant, the Official Receiver acquires all the powers of a Liquidator during the vacancy (S. 185 (5)).

### § 7.—Appointment of a Special Manager.

The Official Receiver as Provisional or actual Liquidator has all the powers of a Liquidator, including power to carry on the Company's business; but, by reason of his official position, he cannot give the business his personal attention and, for this reason, the Act enables him to obtain the appointment of a Special Manager (S. 209).

To obtain the appointment of a Special Manager, the Official Receiver must make a report to the Court stating, *inter alia*, the remuneration which in his opinion ought to be paid to the Special Manager (Rule 48). The appointment is made by the Court upon the application of the Official Receiver, and the order making the appointment may define the powers of the Special Manager and the time during which he is to act (S. 209 (1)).

The remuneration of the Special Manager is fixed by the Court (S. 209 (3)) after receiving a report thereon from O.R., and is usually stated in the order by which the appointment is made; but from time to time the Court may order further remuneration to be paid if good cause is shown (Rule 48).

The Special Manager must give such security and account in such manner as the Board of Trade directs (S. 209 (2)), and, for this purpose, the rules applicable to Liquidators must be observed (see Ch. XVI, § 2). By Rule 49 the accounts verified by affidavit must be sent to the O.R.

The powers given to a Special Manager by the Court are usually those of a Receiver and Manager.

### § 8.—The Statement of Affairs.

When a Winding Up Order has been made or a Provisional Liquidator appointed, a Statement of Affairs has to be submitted to the Official Receiver within 14 days, unless the Court makes an order to the contrary (S. 181).

The Statement, which must be in the prescribed form (see Appendix VII) verified by affidavit, must give particulars of:—

- (a) The Company's assets, debts and liabilities;
- (b) The names, residences and occupations of the creditors;
- (c) The securities held and the dates on which they were given;
- (d) Such other information as may be prescribed or as may be required by the Official Receiver (S. 181 (1)).

The duty of preparing and submitting the Statement of Affairs devolves upon the persons who are directors of the Company, or the secretary or other chief officer, when the Winding Up Order is made or the Provisional Liquidator appointed; but, if necessary, the Official Receiver may obtain



the leave of the Court to call upon any of the following persons to submit or verify the affidavit, *viz.* persons who:—

- (a) are or have been directors or officers of the Company; or
- (b) have taken part in the formation of the Company at any time within one year before the making of the Winding Up Order or the appointment of a Provisional Liquidator; or
- (c) are in the employment of the Company, or have been in the employment of the Company within the said year, and are, in the opinion of the Official Receiver, capable of giving the information required; or
- (d) are or have been within the said year officers of or in the employment of a Company, which is, or within the said year was, an officer of the Company to which the Statement relates (S. 181 (2)).

The Official Receiver supplies the person who is required to submit or verify the Statement with such forms as are necessary (Rule 50) and may from time to time hold personal interviews, which the person concerned must attend (*ibid.*). A refusal to attend is a contempt of Court (*New Par Consols* [1898] 1 Q.B. 673).

Any costs or expenses incurred by a person in making or concurring in making the Statement may be recovered from the Official Receiver or Provisional Liquidator, who may pay such sum as he considers reasonable out of the assets of the Company (S. 181 (4)). But before incurring any such expenses the person concerned must submit to the Official Receiver a statement of his estimated costs and not more than the amount so sanctioned in advance can be recovered, unless the special sanction of the Court is obtained (Rule 54).

The duties of the persons who have made or concurred in making a Statement of Affairs do not terminate when the Statement has been submitted, for at any time subsequently they must, if required, attend upon the Official Receiver and answer all such questions as may be put to them and give such further information as may be asked for (Rule 52).

The period within which the Statement must be submitted, may be extended by the Official Receiver (S. 181 (3)), who, upon request being made by the person required to submit the

Statement, may give a certificate of extension, which must be filed with the proceedings (Rule 51). This certificate makes an application to the Court unnecessary (*ibid.*); but if the extension is refused, the Court has power to overrule the Official Receiver's decision (S. 181 (3)).

The Court may, in special circumstances, dispense with a Statement of Affairs (S. 181 (1)) on such terms as it thinks fit (Rule 55). An application for leave to dispense with the Statement must be made to a Judge in Chambers and must be supported by a report of the Official Receiver (Rule 55).

Any person who in writing states that he is a creditor or contributory of the Company is entitled, at any reasonable hour, to inspect and make copies of the Statement of Affairs, either in person or through an agent (S. 181 (6)).

It is a contempt of Court to make a false statement in writing with a view to obtaining copies of or inspecting the Statement of Affairs (S. 181 (7)).

### § 9.—The Official Receiver's Reports.

Where a Winding Up Order has been made, as soon as possible after receiving the Statement of Affairs, the Official Receiver submits to the Court a Preliminary Report:—

- (a) as to the amount of the capital issued, subscribed and paid up;
- (b) as to the estimated assets and liabilities;
- (c) if the Company has failed, as to the causes of the failure;
- (d) whether in his opinion further enquiry is desirable as to the promotion, formation or failure of the Company, or the conduct of the business thereof (S. 182 (1)).

If a Statement of Affairs has been dispensed with by the Court, the Preliminary Report must be submitted as soon as possible after the date of the order dispensing with the Statement (*ibid.*).

The Official Receiver is obliged to make this Preliminary Report and he MAY, in addition, if he thinks fit, make a Further Report stating:—

- (a) the manner in which the Company was formed; and

- (b) whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer since the formation; and
- (c) any other matters which it seems desirable to bring to the notice of the Court (S. 182 (2)).

If (and only if) a Further Report is made by the Official Receiver *and* it expresses the opinion that a fraud has been committed, the Court may order:—

- (a) the Public Examination of the person charged with fraud (S. 216);
- (b) that the person charged shall not, without leave of the Court, be a director of or in any way, whether directly or indirectly, be concerned in or take part in the management of a Company for a period not exceeding five years (S. 217).

The second of these orders will not, however, be made except on the application of the Official Receiver, who must give 10 days' notice to the person charged of his intention to apply for the order (S. 217 (2)).

### § 10.—Private and Public Examinations.

At any time after a Winding Up Order has been made or a Provisional Liquidator appointed, the Court may summon before it:—

- (a) any officer of the Company; or any person known or suspected of:—
  - (i) having in his possession any property of the Company; or
  - (ii) being indebted to the Company; or
- (b) any person who is deemed to be capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the Company (S. 214 (1)).

Such a person may be required to produce any books or papers in his custody or power relating to the Company, without prejudice to any lien he may enjoy (S. 214 (3)), and may be examined on oath either by word of mouth or by written interrogatories (S. 214 (2)).

The examination under this section takes place in private and the notes of the answers given may not be inspected or copied without leave of the Court, except by the Official Receiver or Liquidator or a Provisional Liquidator other than the Official Receiver while acting as such (Rule 72).

A Private Examination under S. 214 may be ordered at the discretion of the Court, but a Public Examination under S. 216 cannot be ordered unless a charge of fraud has been made by the Official Receiver in his Further Report.

A Public Examination under S. 216 is held before the Judge in open Court; but where the winding up is being conducted by the High Court, the Court may direct that the whole or any part of the examination (including any application as to costs) shall be held before the Registrar of the Court or before any of the persons named in S. 216 (9) of the Act (Rule 60).

The Court, which orders the examination to be held, appoints a day and place, and notice thereof is given by the Official Receiver to:—

- (a) the person to be examined, by registered letter addressed to his usual or last known address (Rule 62);
- (b) the creditors and contributories, by advertisement in *The Gazette* and one or more newspapers (Rule 63).

The Court has power to adjourn the examination from time to time (S. 216 (8)), and notice of an adjournment must be advertised in *The Gazette* (Rule 63).

The Official Receiver, the Liquidator, and any creditor or contributory may take part in the examination either personally or by solicitors or counsel (S. 216 (2) and (3)). The person examined is examined on oath and is bound to answer all questions put or allowed to be put to him by the Court (S. 216 (4) and (5)). Notes of the examination are taken down in writing and are read over to the person charged, who is obliged to sign them. These notes are then filed with the Registrar of the Court (Rule 65), and may be used as evidence against the person charged, or inspected by any creditor or contributory (S. 216 (7)).

Before the examination, the person charged is supplied with a copy of the Official Receiver's Report at his own cost, and he may, also at his own cost, employ a solicitor and counsel

to defend him (S. 216 (6)). He may also apply to the Court to be exculpated from the charges made by the Official Receiver, and if such an application is granted, the Court may award him costs (*ibid.*). These costs may be ordered to be paid out of the assets of the Company, but if the Official Receiver has opposed the exculpation order the Court may make him personally liable for the costs (*John Tweddle & Co.* [1910] 2 K.B. 697).

### § 11.—First Meetings of Creditors and Contributories.

The Official Receiver is required to summon separate meetings of creditors and contributories for the purpose of:—

- (a) determining whether or not application is to be made to the Court for the appointment of a Liquidator in place of the Official Receiver (S. 185 (2)); and
- (b) determining whether or not application is to be made to the Court for the appointment of a Committee of Inspection to act with the Liquidator, and who are to be the members of the Committee, if appointed (S. 198 (1)).

These meetings may be held within 6 weeks of the Winding Up Order where a Special Manager has been appointed, but if there is no such Manager, they must be held within one month of the Order (Rule 119).

Seven days' notice of the meetings, specifying *inter alia* the date and time before which proofs and proxy forms must be lodged with the Official Receiver, must be:—

- (a) advertised in *The Gazette* and one local paper; and
- (b) sent to every person who appears to be a creditor or contributory (Rule 127).

And, if the Official Receiver thinks fit, he may also give notice to such directors or other officers of the Company as, in his opinion, should attend the meeting: and any director or officer so notified *must* attend (Rule 123).

With the notice of the meeting sent to creditors and contributories, general and special forms of proxy must be sent (Rule 146); and it is customary to include the summary of the Statement of Affairs, which has to be supplied to every creditor and contributory as soon as possible after the Statement is

received by the Official Receiver (Rule 124). But the meetings may be held before the summary has been sent out (*ibid.*).

The meetings may be held on different days or at different places (Rule 129) and the chair is taken by the Official Receiver or his nominee (Rule 131). The voting is by majority in number and value of those present (Rule 132); but any creditor or contributory may vote by proxy (Rule 144). Forms of proxy must be lodged with the Official Receiver not later than the time mentioned in the notice convening the meeting (Rule 152), and the time so mentioned must be not earlier than 12 noon of the day but one before, and not later than 12 noon of the day before, the day appointed for the meeting, unless the Court otherwise directs (*ibid.*).

Creditors' proofs for use at the meeting must be lodged with the Official Receiver before the time mentioned in the notice convening the meeting; but any creditor who lodges a proof may vote (Rule 137) subject to the restrictions imposed by Rule 138.

As regards the procedure at meetings in a winding up, see Ch. XVI, § 8.





## ABSTRACT OF CHAPTER XVI

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### WINDING UP BY THE COURT: GENERAL POWERS AND DUTIES OF THE LIQUIDATOR

- § 1.—APPOINTMENT OF A LIQUIDATOR.
- § 2.—THE LIQUIDATOR'S SECURITY.
- § 3.—REMUNERATION OF THE LIQUIDATOR.
- § 4.—RESIGNATION AND REMOVAL OF THE LIQUIDATOR.
- § 5.—THE LIQUIDATOR'S RIGHT TO THE COMPANY'S PROPERTY.
- § 6.—RIGHTS UNDER THIRD PARTY INSURANCE POLICIES.
- § 7.—POWERS OF THE LIQUIDATOR.
- § 8.—PROCEDURE AT MEETINGS—
  - (a) NOTICE
  - (b) CHAIRMAN.
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  - (d) ADJOURNMENTS.
  - (e) RESOLUTIONS.
  - (f) MINUTES
  - (g) PROXIES.
  - (h) CORPORATE CREDITORS AND CONTRIBUTORIES.
  - (i) CREDITORS' VOTES.
  - (j) VOTES OF SECURED CREDITORS.
- § 9.—THE COMMITTEE OF INSPECTION.
- § 10.—COMPROMISES WITH CREDITORS OR CONTRIBUTORIES OR DEBTORS.
- § 11.—DISCLAIMER OF ONEROUS ASSETS.
- § 12.—EFFECT OF DISCLAIMER.
- § 13.—BOOKS TO BE KEPT BY A LIQUIDATOR.
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- § 15.—INSPECTION OF BOOKS.
- § 16.—BOOKS OF EVIDENCE.
- § 17.—DISPOSAL OF BOOKS.
- § 18.—THE LIQUIDATOR'S RETURN.
- § 19.—BANKING ARRANGEMENTS.
- § 20.—PAYMENT OF BALANCES INTO THE COMPANIES LIQUIDATION ACCOUNT.
- § 21.—INVESTMENT OF FUNDS AT BANK OF ENGLAND.
- § 22.—RELEASE OF THE LIQUIDATOR.
- § 23.—DISSOLUTION OF THE COMPANY.
- § 24.—DISPOSITION OF ASSETS ON DISSOLUTION.
- § 25.—POWER OF COURT TO STAY WINDING UP.





## CHAPTER XVI

# WINDING UP BY THE COURT: GENERAL POWERS AND DUTIES OF THE LIQUIDATOR

### § 1.—Appointment of a Liquidator.

Where the first meetings of creditors and contributories resolve that the Court shall be asked to appoint a Liquidator other than the Official Receiver, the Official Receiver applies to the Court for the appointment of the person nominated by the meetings (Rule 56).

Notice of the appointment is then gazetted by the Board of Trade at the expense of the person appointed (Rule 56), who must:—

- (a) advertise the appointment as directed by the Court (*ibid.*); and
- (b) give notice thereof to the Registrar of Companies (S. 186; Form 39, Companies (Forms) Order, 1929).

The expense of gazetting the appointment may, however, be charged against the assets of the Company (Rule 56).

The Court may appoint as Liquidator any fit person except a body corporate (S. 278), and, if necessary, two or more Liquidators may be appointed (S. 183) to act jointly or to perform distinct and separate functions (S. 188 (4)).

Unless there is some good reason to the contrary, the person nominated by the meetings of creditors or contributories is appointed; but if different persons are nominated by each meeting, the Court may fix a time and place for considering the views of each group and will appoint whichever nominee it considers most appropriate (S. 185 (3), Rule 56).

### § 2.—The Liquidator's Security.

The person appointed Liquidator cannot act until he has given notice of his appointment to the Registrar of Companies and security in the manner prescribed by the Board of Trade (S. 186).

The amount of the security and the person to whom it is to be given are fixed by the Board of Trade, who may from

time to time increase or diminish the amount (Rule 57). In general, the bond of an insurance company or guarantee society is accepted, the premiums being payable by the Liquidator who may *not* charge the expense against the assets of the Company (*ibid.*).

The certificate of the Board of Trade that security has been given must be filed with the Registrar of the Court (*ibid.*), and if security is not given within the time prescribed by the order making the appointment, the failure is reported to the Court, who may thereupon rescind the order and direct new meetings of creditors and contributories to be summoned (Rule 58). The Liquidator may also be removed from office if he fails to keep up his security (*ibid.*).

Separate security need not be given, however, for every winding up, and persons who act frequently as Liquidators may furnish general security to be available for any winding up (Rule 57).

### § 3.—Remuneration of the Liquidator.

Where a person other than the Official Receiver is appointed liquidator, he is entitled to receive such salary or remuneration by way of percentage or otherwise as the Court may direct, and if more persons than one are appointed liquidators, their remuneration is to be distributed among them in such proportions as the Court directs (S. 188).

Unless an order to the contrary is made by the Court, the remuneration of the Liquidator is fixed by the Committee of Inspection (Rule 157). It must take the form of a commission or percentage of which one part is payable on the amount realised (after deducting any sums paid to secured creditors—other than debenture-holders—out of the proceeds of their securities), and the other part on the amount distributed in dividend (*ibid.*). But if there is no Committee of Inspection, the remuneration is fixed by the scale of fees payable to an Official Receiver acting as Liquidator, unless the Court directs some other arrangement to be made (*ibid.*).

The Board of Trade may, moreover, apply to the Court to fix the remuneration where they are of the opinion that the amount awarded by the Committee of Inspection is too large (*ibid.*).

Where a voluntary liquidation is superseded by a compulsory liquidation, the Court has power by Rule 192 to review the amount of remuneration previously awarded by the members to the voluntary liquidator (*in re Mortimers (London) Ltd.* [1937] 53 T.L.R. 493).

The Liquidator must not, in any circumstances, accept from any solicitor, auctioneer or any other person who is connected with the Company or the winding up, any gift, remuneration or other benefit beyond his remuneration, nor may he arrange to give up any part of his remuneration to any such person (Rule 158).

Moreover, he must not, without the sanction of the Court:—

- (a) purchase any part of the Company's assets either in person or through any partner, employer, agent, clerk or servant (Rule 159); or
- (b) purchase goods for the purpose of carrying on the Company's business, from any person whose connection with him is of such a nature that he would receive a portion of any profit arising out of the transaction (Rule 160).

#### § 4.—Resignation and Removal of the Liquidator.

A Liquidator who wishes to resign his office must summon separate meetings of creditors and contributories to decide whether his resignation shall be accepted (Rule 165). If by resolution the meetings accept the resignation, the Liquidator must file a memorandum with the Registrar of the Court and send notice to the Official Receiver, whereupon the resignation takes effect (*ibid.*).

If, on the other hand, either of the meetings refuses to accept the resignation or if, for any reason, no resolutions are passed, the Liquidator must report the results of the meetings to the Court and the Official Receiver. He or the Official Receiver may then apply to the Court to determine whether the resignation shall be accepted and the Court may make such order as it thinks fit (Rule 165).

A Liquidator may be removed from office by the Court on cause being shown (S. 188 (1)), and is deemed to have been removed if a Receiving Order in Bankruptcy is made against him (Rule 166).

When for any reason (e.g. death, removal from office or resignation) the office of Liquidator falls vacant, the vacancy may be filled by the Court (S. 188 (3)); but until a new Liquidator is appointed, the functions of Liquidator are performed by the Official Receiver (S. 185 (5)). On the request of not less than one-tenth in value of the creditors or contributories, the Official Receiver must summon meetings for the purpose of determining whether or not the vacancy shall be filled (Rule 56).

Upon the resignation or removal of a Liquidator, he must deliver to the Official Receiver or the new Liquidator all books kept by him and all other books, documents, papers and accounts in his possession relating to the office of Liquidator (Rule 178).

It should be observed that neither resignation nor removal releases the Liquidator from liability. He must, therefore, apply to the Board of Trade for his release in accordance with the rules described in § 22 below.

### § 5.—The Liquidator's Right to the Company's Property.

Upon the making of the Winding Up Order, the Official Receiver as Provisional Liquidator takes the property of the Company into his custody (S. 189); but when the Liquidator appointed by the Court has given security and notified his appointment to the Registrar of Companies, the property is delivered up to him (Rule 164). Before delivering up the property in his custody, the Official Receiver is entitled to require the Liquidator to discharge any balance due to him on account of fees, costs and charges properly incurred by him, and on account of any advances properly made by him, together with interest on the advances at the rate of 4 per cent. per annum; and in respect of this balance the Official Receiver has a lien upon the assets of the Company (*ibid.*). In addition, it is the duty of the Official Receiver to communicate to the Liquidator any information as to the estate and affairs of the Company (*ibid.*).

But the Liquidator is not entitled to memoranda made by the Official Receiver of information given to him by officers of the Company (*Lake George Mines Ltd.* [1904] 1 Ch. 803).

The Liquidator has the custody of all property to which the Company is entitled (S. 189), but the title to the property

continues to be vested in the Company until it is conveyed by sale or other disposition to some other person. The Liquidator may, however, if he finds it necessary, apply to the Court to have the whole or any part of the Company's property vested in him and thereupon the liquidator, after giving such security as the Court may direct, may bring or defend in his official name any action or other legal proceeding relating to that property, or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property (S. 190).

Any property (including leaseholds) which, at the date of the Company's dissolution, remains vested in the Company or in trustees for the Company is *bona vacantia*; but this rule does not apply to property held by the Company in trust for some other person (S. 296). *Bona vacantia* vest in the Crown or the Duchy of Lancaster, or the Duke of Cornwall (*ibid.*).

#### § 6.—Rights Under Third Party Insurance Policies.

In general, any right to indemnity enjoyed by the Company under an insurance policy may be enforced by the Liquidator, and any sum of money obtained from the insurers may be used as an asset for the payment of the Company's liabilities. But to this rule two exceptions have been made.

1. Where the Company is insured against liabilities to third parties (other than liabilities under the Workmen's Compensation Act, 1925), when a Winding Up Order is made, the rights of the Company against the insurer are transferred to and vested in the third party to whom a liability has been incurred (S. 1 (1), *Third Parties (Rights against Insurers) Act*, 1930).

Should any person claim that the Company is under a liability to him, the Liquidator must give such person any information as may reasonably be required by him for the purpose of ascertaining whether any rights have been vested in him by the Act, and for the purpose of enforcing such rights (S. 2 (1), *ibid.*). And this duty must be performed by the Liquidator notwithstanding any provision in the contract of insurance which purports to forbid the giving of information to third parties (*ibid.*). And, in particular, the Liquidator must allow all contracts of insurance, receipts for premiums, and other relevant documents in his possession to be inspected and copied (S. 2 (3), *ibid.*).

No agreement made between the insurer and the Company after liability has been incurred to a third party and after the Commencement of the winding up, and no waiver, assignment or other disposition made by, or payment made to the Company after the Commencement can affect the rights of third parties or the duties of the Liquidator in this respect (S. 3, *ibid.*).

2. Where the Company is insured against employers' liability risks, a workman who is entitled to compensation under the Workmen's Compensation Act, 1925, is similarly invested with the Company's rights against the insurers (S. 7, *Workmen's Compensation Act*, 1925).

### § 7.—Powers of the Liquidator.

In order that the execution of his multifarious duties shall not be impeded by frequent disputes as to what the Liquidator may or may not do, the Act confers upon him certain definite powers.

Some of these powers may be exercised by the Liquidator at his discretion and without sanction; but others may not be exercised unless the Liquidator first obtain permission from some controlling authority, e.g. the Committee of Inspection, the Official Receiver or the Court.

Without obtaining sanction, the Liquidator has power:—

- (a) to sell the real and personal property, and things in action of the Company by public auction or private contract with power to transfer the whole thereof to any person or Company, or to sell the same in parcels;
- (b) to do all acts and to execute, in the name and on behalf of the Company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the Company's seal;
- (c) to prove, rank, and claim in the bankruptcy, insolvency, or sequestration of any contributory, for any balance against his estate, and to receive dividends in the bankruptcy, insolvency, or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors;

- (d) to draw, accept, make, and indorse any bill of exchange or promissory note in the name and on behalf of the Company, with the same effect with respect to the liability of the Company as if the bill or note had been drawn, accepted, made, or indorsed by or on behalf of the Company in the course of its business;
- (e) to raise on the security of the assets of the Company any money requisite;
- (f) to take out in his official name Letters of Administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the Company, and in all such cases the money due shall, for the purpose of enabling the Liquidator to take out the Letters of Administration or recover the money, be deemed to be due to the Liquidator himself;
- (g) to appoint an agent to do any business which the Liquidator is unable to do himself;
- (h) to do all such other things as may be necessary for winding up the affairs of the Company and distributing its assets (S. 191 (2));
- (i) to settle a List of contributories (Rule 76);
- (j) to require any contributory on the List, or any trustee, banker, agent or officer of the Company to pay, deliver, convey, surrender or transfer to him any money, property or books and papers in his hands to which the Company is *prima facie* entitled (Rule 77);
- (k) to apply to the Court for directions in relation to any particular matter arising under the winding up (S. 192 (3));
- (l) to summon meetings of creditors or contributories for the purpose of ascertaining their wishes (S. 192 (2));
- (m) to administer oaths and take affidavits for the purpose of his duties in relation to proofs (Rule 109).

In addition, with the permission of the Court or the Committee of Inspection, the Liquidator has power:—

- (a) to bring or defend any action or other legal proceeding in the name and on behalf of the Company;



- (b) to carry on the business of the Company, so far as may be necessary for the beneficial winding up thereof;
- (c) to appoint a solicitor or law agent to assist him in the performance of his duties;
- (d) to pay any classes of creditors in full;
- (e) to make any compromise or arrangement with creditors or persons claiming to be creditors;
- (f) to compromise all calls and liabilities subsisting or supposed to subsist between the Company and a contributory or alleged contributory, or other debtor or person apprehending liability to the Company (S. 191 (1));
- (g) to make calls (S. 220).

Where there is no Committee of Inspection capable of acting, permission to exercise the majority of these powers may be given by the Board of Trade (S. 200), which is, for this purpose represented by the Official Receiver (Rule 211); but the Board cannot sanction a call, for which permission of the Court must be obtained (S. 220).

And in no case (even where there is a Committee of Inspection) can the Liquidator rectify the register of members unless he first obtains permission from the Court (S. 220).

The statement that the Liquidator may exercise certain of his powers without sanction must not be taken to imply that, as regards these powers, his conduct cannot be controlled, for in administering the assets of the Company, the Liquidator must have regard to any directions that may be given by resolution of the creditors or contributories, or by the Committee of Inspection (S. 192 (1)); and all his powers are subject to the control of the Court, to which application may be made in case of need by any creditor or contributory (S. 191 (3)).

The directions of the Committee of Inspection may, however, be overridden by the creditors or contributories (S. 192 (1)); and the Liquidator must summon meetings of creditors or contributories for the purpose of ascertaining their wishes if:

- (a) the creditors or contributories so resolved at some past meeting; or
- (b) one-tenth in value of the creditors or contributories so direct in writing (S. 192 (2)).

And the Liquidator may of his own accord summon such meetings for the purpose of ascertaining their wishes (*ibid.*).

If any person is aggrieved by any act or decision of the liquidator, that person may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order as it thinks just (S. 192 (5)).

Furthermore, upon complaint made by any creditor or contributory, the Board of Trade may inquire into the matter and, if necessary, apply to the Court to examine the Liquidator on oath (S. 196 and Rule 213). And the Board may direct a local investigation of the books, accounts and vouchers of the Liquidator (S. 196).

With a view to ensuring still further that a Liquidator shall carry out his duties, the Act requires him to give information and access to the books to the Official Receiver (S. 186), and empowers the Court, on the application of any creditor or contributory or the Registrar of Companies, to order the Liquidator to make good defaults in making returns or giving notices and to charge him with the costs of the proceedings (S. 279). But this latter order cannot be made unless the applicant has given notice to the Liquidator calling upon him to make good his default within 14 days (*ibid.*).

Finally, misfeasance proceedings may be taken against any past or present Liquidator under S. 276 (see Ch. XXII, § 6) notwithstanding that the Liquidator has incurred a criminal liability.

### § 8.—Procedure at Meetings.

(a) NOTICE. All meetings of creditors and contributories must be summoned by seven days notice:—

- (i) advertised in *The Gazette* and a local paper; and
- (ii) sent by post to every person appearing by the Company's books to be a creditor (in the case of a meeting of creditors) or a contributory (in the case of a meeting of contributories) (Rule 127).

The creditors need not meet at the same place or time as the contributories (Rule 129), and in selecting a time and place the Liquidator should consider the convenience of the majority (*ibid.*).

Where the meeting is summoned by the Liquidator of his own accord, the costs are payable out of the assets; but where the meeting is summoned at the instance of some other person, such person is primarily liable for the costs, unless the Court orders or the meeting resolves that they shall be repaid out of the assets (Rule 130). And before calling the meeting the Liquidator is entitled to have the costs deposited with him, the amount being assessed by reference to the number of persons to whom notice must be sent, *viz.* 2s. per person for the first 20, 1s. per person for the next 30, and 6d. per additional person (*ibid.*).

(b) CHAIRMAN. Where the meeting is summoned by the Liquidator (or Official Receiver) he or his nominee is chairman (Rule 131). In other cases, the meeting may elect its own chairman (*ibid.*).

(c) QUORUM. To constitute a quorum there must be present, personally or by proxy:

- (i) 3 creditors (or contributories) where the total number exceeds 3; or
- (ii) all creditors (or contributories) where the total number is 3 or less (Rule 136).

If no quorum is present within half an hour of the appointed time, the meeting cannot do anything except elect a chairman, accept proof of debts and adjourn (*ibid.*); and, unless the chairman appoints some other day, time or place, the meeting is to stand adjourned to the same day in the following week at the same time and place (*ibid.*). But the day (if any) appointed by the chairman must be not less than 7 nor more than 21 days later (*ibid.*).

(d) ADJOURNMENTS. With the consent of the meeting, the chairman may adjourn it from time to time and from place to place; but the adjourned meeting must be held at the same place as the original meeting unless the resolution for adjournment specifies another place, or the Court otherwise orders (Rule 135).

(e) RESOLUTIONS. All resolutions are to be passed by a majority in number and value of creditors (or contributories) present personally or by proxy and voting: the value of a contributory's vote being determined by the Articles (Rule 132).

A certified copy of every resolution must be filed with the Registrar of the Court (Rule 133).

(f) MINUTES. The chairman must see that minutes of the proceedings are kept (Rule 143). All minutes must be signed either by the chairman of the meeting reported or by the chairman of the next ensuing meeting (*ibid.*). A list of creditors (or contributories) present must also be made (Form 74).

(g) PROXIES. Every creditor (or contributory) is entitled to vote by proxy (Rule 144) and general and special forms of proxy (Forms 80 and 81) must be sent out with the notice of the meeting (Rule 146). Either form of proxy may be given to any person (Rules 147 and 148) except an infant (Rule 152); but neither the name nor the description of any person may be printed or inserted in the body of a form of proxy before it is sent out (Rule 146). Every form of proxy must be filled in in the handwriting of the person giving the proxy, or his manager or clerk, or some other person in his regular employment, or a Commissioner for Oaths (Rule 145). But proxies given by blind or illiterate *creditors* may be in the handwriting of a witness, whose name and address must be attached (Rule 154). Proxies may be given to the Official Receiver, who may in writing sub-delegate his duties (Rule 153); or to the chairman of the meeting or the Liquidator (Rule 150). But if solicitation in obtaining proxies or procuring his appointment is used by or on behalf of the Liquidator (otherwise than by direction of a meeting of creditors or contributories), the Court may disallow the Liquidator's remuneration, notwithstanding any resolution to the contrary (Rule 149).

A *general proxy* authorises the holder to vote at any meeting of creditors (or contributories) in the winding up (Form 80). A *special proxy*, on the other hand, gives authority to vote at a specified meeting or its adjournment only (Rule 148):

- (i) for or against the appointment or continuance in office of any *specified* person as Liquidator or member of a Committee of Inspection; *and*
- (ii) on all questions relating to any other matter and arising at the meeting or its adjournment (*ibid.*).

But no proxy holder can vote in favour of a resolution which would, directly or indirectly, place himself, his partner or his employer in a position to receive remuneration out of the

estate of the Company otherwise than as a creditor rateably with the other creditors of the Company (Rule 151); subject however to the proviso that the holder of a *special* proxy may vote for an application to the Court to appoint *himself* as Liquidator (*ibid.*).

Forms of proxy in a Winding Up by the Court need not be stamped (S. 281 (1)).

Proxies for use at meetings (other than the first meetings of creditors and contributories, see Ch. XV, § 11) must be lodged with the Official Receiver or Liquidator not later than 4 p.m. of the day before the day of the meeting or adjourned meeting at which they are intended to be used (Rule 152).

(h) CORPORATE CREDITORS AND CONTRIBUTORIES. Where any creditor or contributory is a corporate body, its directors or other governing body may by resolution authorise any person it thinks fit to represent it at meetings (S. 116). The person so appointed must produce to the chairman of the meeting a copy of the resolution giving him authority, either under the seal of the corporation or certified by the secretary or a director (Rule 144). But the authority is not a proxy and need not be lodged as such before the meeting.

(i) CREDITORS' VOTES. In the case of meetings other than the first meetings of creditors and contributories (see Ch. XV, § 11), a creditor is not entitled to vote unless he has lodged with the Official Receiver or Liquidator a proof of his debt *and* such proof has been admitted wholly or in part before the date of the meeting (Rule 137), unless the debt claimed is such that no proof is necessary (see Ch. XVII, § 5). But no creditor may vote at all in respect of an unliquidated, contingent or unascertained debt (Rule 138), and the voting rights of secured creditors are subject to special rules (see below). The chairman of every meeting has power to admit or reject proofs for the purpose of voting, and, in cases of doubt, he may admit provisionally after marking it as objected to, allowing the creditor to vote subject to the vote being subsequently declared invalid (Rule 141). And in any case his decision is subject to appeal to the Court (*ibid.*).

As to proofs in general, see Ch. XVII, §§ 5 to 8

(j) VOTES OF SECURED CREDITORS. A secured creditor must, for the purpose of voting, either surrender his security,

or state in his proof particulars of the security, the date when it was given and the value at which he assesses it (Rule 139). If he surrenders the security, he may vote in respect of the whole amount due to him; but if he adopts the alternative method, he is only entitled to vote in respect of the balance due after deducting the value put upon the security (*ibid.*). A secured creditor who votes in respect of his whole debt is deemed to have surrendered his security, unless the Court is satisfied that his failure to value it was due to inadvertence (*ibid.*).

Where the security is valued in the proof and the creditor votes in respect of the balance unsecured, the Official Receiver or Liquidator may require the creditor to give up the security on payment of the estimated value with a 20 per cent. addition; but the right must be exercised within 28 days after the proof has been used for voting purposes (Rule 140). At any time before he is so called upon to give up his security, the creditor may, however, correct the valuation by submitting a new proof; but if he does this he forfeits his right to the 20 per cent. addition and the Liquidator may compel him to give up the security at the amended valuation (*ibid.*).

A creditor, whose debt is on, or secured by, a current bill of exchange, or promissory note held by him, may not vote unless he is willing to treat as a security and value the liability to him thereon of every person who is liable thereon antecedently to the Company and against whom a Receiving Order has not been made (Rule 138). Thus, where the Company is liable as drawer or endorser of a bill the holder must treat as a security the antecedent liabilities of the acceptor and prior endorsers, with the general result that, being fully secured, he cannot vote upon the bill. But where the Company is liable as acceptor of the bill, as no party is liable antecedently, the holder may vote as unsecured creditor for the full amount of the bill.

But where a creditor seeks to prove in respect of a bill of exchange, promissory note, or other negotiable instrument or security on which the Company is liable, subject to any contrary special order of the Court, the instrument must be marked by the Official Receiver, or other chairman of the meeting, or Liquidator before the proof can be admitted for voting or any other purpose (Rule 102).

**§ 9.—The Committee of Inspection.**

If the first meetings of the creditors and contributories resolve to apply to the Court for the appointment of a Liquidator, they may also resolve to apply for the appointment of a Committee of Inspection to act with the Liquidator; and, if this resolution is carried, they may proceed to determine who shall be members of the Committee (S. 198 (1)).

The Committee must consist of creditors and contributories, or of persons holding general powers of attorney from creditors or contributories, in such proportions as may be agreed upon by the meetings, or, if the meetings cannot agree, as may be determined by the Court (S. 199 (1)). The Act does not fix the maximum or minimum membership of the Committee; but it does provide by implication that the Committee may not act if the number of members falls below two (S. 199 (8)). In such a case the duties of the Committee are to be discharged by the Official Receiver (S. 200; Rule 211), though, as we have observed already, the Official Receiver cannot sanction a call (S. 220).

A member of the Committee may resign by serving notice in writing on the Liquidator (S. 199 (4)), and may be removed by resolution of the creditors or contributories (according to which body made the appointment) at a meeting of which seven days' notice stating the object has been given (S. 199 (3)). Moreover, a member forfeits his office automatically if he (*a*) is made bankrupt, or (*b*) makes a composition or arrangement with his creditors, or (*c*) is absent, without leave, from five consecutive meetings of the Committee (S. 199 (5)).

A vacancy on the Committee may be filled by the body which made the original appointment (S. 199 (7)); but this is not often done on account of the expense of summoning a meeting for the purpose; and the Committee may continue to act notwithstanding vacancies, so long as it has at least two members remaining (S. 199 (8)).

No member of the Committee may, directly or indirectly, by himself or any employer, partner, clerk, agent or servant, without leave of the Court:

- (*a*) derive any profit from any transaction arising out of the winding up; or
- (*b*) receive out of the assets any payment for services

rendered by him in connection with the administration of the assets or for goods supplied by him to the Liquidator or on account of the Company; or

- (c) become the purchaser of any part of the Company's assets (Rules 159 and 161).

The sanction of the Court must be obtained before the profit has been earned (*ex parte Gallard* [1896] 1 Q.B. 68) and the Court may, on the application of the Board of Trade or any creditor or contributory, set aside a purchase made without leave (Rule 159); and the Board of Trade may disallow any payment or recover any profit made in contravention of these rules (Rule 161).

The Committee meets at such times as it may appoint or, failing such an appointment, at least once a month, but additional meetings may be called from time to time by the Liquidator or any member of the Committee (S. 199 (2)). The Committee acts by resolution of the majority of the members present at a meeting; but no resolution may be passed unless a majority of the total number of members is present (S. 199 (3)).

#### § 10.—Compromises with Creditors or Contributories or Debtors.

We have already seen (*ante*, § 7) that a Liquidator cannot without sanction:

- (a) pay any classes of creditors in full; or
- (b) make compromises with any creditors; or
- (c) make compromises with any contributories or debtors of the Company (S. 191 (1)).

To do any of these things, he must first obtain the sanction of the Committee of Inspection or the Court; though, where there is no Committee capable of acting, the sanction may be given by the Official Receiver (Rule 211).

As regards compromises with *individual* creditors, contributories or debtors, this sanction is sufficient, provided that the other party to the compromise consents to the arrangement. But where it is proposed to make an arrangement with a class of creditors or members which is to be binding on all members of the class, including dissentients, the Liquidator must take proceedings under S. 153 of the Act.



First he must apply to the Court by summons under Order 53B, r. 8 (9) for an order summoning a meeting of the class of creditors or members concerned (S. 153 (1)); an office copy of the order must be filed with the Registrar of Companies (S. 153 (3)).

The meeting so convened by order of the Court considers the proposed arrangement, and, if a *majority in number representing three-fourths in value* of the creditors or members present and voting either in person or by proxy agree to it, the compromise or arrangement will, if sanctioned by the Court, be binding on (a) the Liquidator, (b) the contributories of the Company, and (c) all members of the class represented by the meeting (S. 153 (2)).

It is important to note that all members of the class concerned must have substantially equivalent rights or liabilities. Thus, in *Sovereign Life Assurance Co. v. Dodd* [1892] 2 Q.B. 573, where a Company proposed an arrangement with its policy-holders, it was held that it was necessary to hold separate meetings of (a) holders of matured policies, and (b) holders of policies which had not matured. And in *United Provident Assurance Co.* [1910] 2 Ch. 477, it was held that the holders of shares on which payments in advance of calls have been made form a separate class of members.

It seems that the procedure under this section is not available for making compromises with debtors of the Company or with contributories who are not members of the Company at the date of the winding up.

### § 11.—Disclaimer of Onerous Assets.

Occasionally assets of the Company are of such a nature that the creditors and contributories would be better off without them. Thus, shares which are not fully paid and short term leases with repairing covenants will frequently prove to be not only worthless but positively burdensome.

In this respect the Liquidator's position is unlike that of a Trustee in Bankruptcy, for, as the Company's property does not vest in him, unless he obtains an order of the Court under S. 190, he can incur no personal liability by reason of the burdensome qualities of the assets. The Liquidator does not, therefore, require a power of disclaimer for his own protection, but in the interests of the creditors and contributories he has

been given power to disclaim, subject to the sanction of the Court:

- (a) land of any tenure burdened with onerous covenants;
- (b) shares or stock in Companies;
- (c) unprofitable contracts; and
- (d) any other property that is unsaleable or not readily saleable, by reason of its binding the possessor to the performance of any onerous act, or to the payment of any sum of money (S. 267 (1)).

The power may be exercised notwithstanding that the Liquidator has endeavoured to sell, or taken possession of, or exercised acts of ownership in relation to the property concerned (*ibid.*); but it must be used within 12 months after the Commencement of the winding up, subject to the proviso that where the property does not come to the Liquidator's knowledge until more than one month after the Commencement, his power to disclaim shall continue for 12 months after the date on which he becomes aware of the property (*ibid.*). In any case, however, the Court may extend the period within which the power is exercisable (*ibid.*).

The foregoing rules are, however, subject to these qualifications:

1. That, if any interested person in writing calls upon the Liquidator to decide whether or not he will disclaim, the power will be lost if the Liquidator does not, within 28 days after receiving the application, give notice of his intention to apply to the Court for leave to disclaim (S. 267 (4)).
2. That, if, in the case of a contract, the power to disclaim is lost under the last rule, the Company shall be deemed to have adopted the contract (*ibid.*).

In order to exercise the power of disclaimer, the Liquidator must by *ex parte* summons apply to the Court for leave (Rule 73), supporting the application by an affidavit showing who are the parties interested and what their interests are. The Court will then direct the Liquidator to give notice to the parties interested, unless such notices are deemed unnecessary, and may adjourn the proceedings in order to enable such parties to attend.

The disclaimer must be made in writing and, where the subject-matter is a lease, Form 35 must be filed at the office of the Registrar of the Court before the disclaimer can operate (Rule 73). Notice of disclaimer of a lease must be given to the landlord (Form 36) after the leave of the Court has been obtained.

### § 12.—Effect of a Disclaimer.

The disclaimer determines, as from the date on which it is made, the rights, interest and liabilities of the Company, and the property of the Company, in or in respect of the property disclaimed; but it does not affect the rights or liabilities of any other person, except so far as it is necessary for the purpose of releasing the Company from liability (S. 267 (2)); and any person who is injured by the disclaimer is entitled to prove as a creditor for the amount of the injury (S. 267 (7)).

The disclaimer does not, moreover, vest the property disclaimed in any other person. But the Court may, upon the application of an interested party (Rule 74), make an order vesting the property in the applicant where it seems just that this should be done (S. 267 (6)).

Where a lease is disclaimed, however, the Court cannot vest the lease in a sub-tenant of the Company or a person to whom the Company has mortgaged the lease, unless such person will accept the vesting of the property—

- (a) subject to the same liabilities and obligations as those to which the Company was subject under the lease in respect of the property at the commencement of the winding up; or
- (b) subject to the same liabilities and obligations as if the lease had been assigned to that person at that date.

If the mortgagee or under-lessee decline to accept a vesting order of the property upon such terms, he will be excluded from all interest in and security upon the property (S. 267 (6)).

Moreover, where a person applies for a vesting order in respect of a disclaimed lease and there is a sub-tenant or a mortgagee, the said sub-tenant or mortgagee will be given the option of having a vesting order on the terms described above and, if the offer is not accepted within the period fixed by the Court, the Court may vest the lease in the person who has

applied for it and exclude the sub-lessee or mortgagee from all further interest therein (Rule 74).

*Example.*—X is the landlord of property leased to the Company. The Company mortgages the lease to Z as security for an advance of £500.

The Company goes into liquidation and the Liquidator disclaims the lease. X applies to the Court for a vesting order.

The Court will direct that notice be given to Z offering him a vesting order on the terms laid down by S. 267 (6). If Z does not apply for this order within the time allowed by the notice, the Court will vest the lease in X and exclude Z from all further interest therein, i.e. destroy his security.

### § 13.—Books to be Kept by a Liquidator.

The Official Receiver, until a Liquidator is appointed, and thereafter the Liquidator, must keep the following books:

1. *A Record Book* in which he must record all minutes, all proceedings had and resolutions passed at any meeting of creditors or contributories, or of the Committee of Inspection, and all such matters as may be necessary to give a correct view of his administration of the Company's affairs (Rule 169).

But documents of a confidential nature (e.g. counsel's opinions) need not be inserted or shown to any person other than a member of the Committee of Inspection, the Official Receiver or the Board of Trade (*ibid.*).

2. *A Cash Book*, in the prescribed form, in which must be entered from day to day receipts and payments (Rule 170).

3. *A Trading Account*, where the Liquidator carries on the business of the Company (Rule 174).

The weekly totals of receipts and payments on the Trading Account must be incorporated in the Cash Book (*ibid.*).

### § 14.—Audit of Liquidator's Accounts.

The Liquidator must submit the Record Book and Cash Book, together with any other requisite books and vouchers, to the Committee of Inspection when required (Rule 170), and, at least once every 3 months, the Committee of Inspection must audit the Cash Book and certify (Form 86) therein under their hands the day on which it was audited (Rule 172).

In addition, at least once a month, the Liquidator must verify the Trading Account by affidavit (Form 89), and submit it to the Committee of Inspection, or such member thereof as may be appointed by the Committee for that purpose, who must examine and certify the same (Rule 174; Form 88).

Furthermore, at the expiration of every period of 6 months from the date of the Winding Up Order, and when the assets of the Company have been fully realised and distributed, the Liquidator must transmit to the Board of Trade (Rule 173):

- (a) a copy in duplicate of the Cash Book for the preceding 6 months;
- (b) the necessary vouchers;
- (c) the certificates of audit by the Committee of Inspection;
- (d) a report on the position of the Liquidation;
- (e) a summary of the accounts in prescribed form (Rule 176);
- (f) an affidavit verifying the accounts (Form 87).

With the *first* accounts he must also send a summary of the Statement of Affairs, showing thereon the amounts realised, and explaining the cause of the non-realisation of such assets as may be unrealised (Rule 173).

If, since the date of his appointment or since the last audit of his accounts, as the case may be, the Liquidator has not received or paid any money on account of the assets of the Company, he must forward to the Board of Trade an "Affidavit of no Receipts or Payments" at the time when he is required to submit his accounts to the Board of Trade (Rule 177).

Having audited the Liquidator's accounts, the Board of Trade certify the fact upon the account and the duplicate copy, which is then filed with the Registrar of the Court (Rule 175). In addition, the Board of Trade will require the Liquidator to prepare printed copies of the summary of his accounts, which must be put into stamped addressed envelopes for transmission to each creditor and contributory. The cost of printing and posting these copies is to be charged upon the assets of the Company (Rule 176).

The audit fee payable to the Board of Trade takes the form of a percentage on the amount brought to credit, including the produce of calls on contributories, but after deducting (a) the amount spent out of the money received in carrying

on the business of the Company, and (b) amounts paid to secured creditors (other than debenture-holders). The prescribed percentages are as follow (*Companies Winding Up (Fees) Order, 1929*):—

On the first	£5,000 or fraction thereof	..	1½%
" next	£95,000	" "	.. 1 %
" "	£400,000	" "	.. ½%
" "	£500,000	" "	.. ¼%
Above	£1,000,000	.. ..	.. ⅛%

### § 15.—Inspection of Books.

At any time after the making of a Winding Up Order, the Court may make an order for the inspection of the books and papers of the Company by creditors and contributories (S. 212), but there is no right to inspect such books and papers without the leave of the Court, except by the Official Receiver, who may inspect *virtute officii* (S. 186).

On the other hand, any creditor or contributory may inspect the books of the Liquidator personally or by an agent (S. 193), subject to the provisions of Rule 169 as to documents of a confidential nature (see *ante*, § 13). In addition, the copies of the Liquidator's accounts which are audited by the Board of Trade are open to the inspection of any creditor, or of any other interested person (S. 195 (4)).

### § 16.—Books as Evidence.

All books and papers of the Company and its Liquidators are, as between the contributories of the Company, *prima facie* evidence of the truth of all matters purporting to be therein recorded (S. 282).

### § 17.—Disposal of Books.

When a Company has been wound up and is about to be dissolved, the books and papers of the Company and of the liquidator may be disposed of in such way as the Court directs. After five years from the dissolution no responsibility shall rest on the Company, the liquidator or any person to whom the custody of the books and papers had been committed, by reason of any book or paper not being forthcoming to any person claiming to be interested therein (S. 283).

At any time during the progress of a Liquidation the Board of Trade may, on the application of the Official Receiver or

the Liquidator, direct that such of the books, papers and documents of the Company or the Liquidator as are no longer required, may be sold, destroyed or otherwise disposed of (Rule 178).

Upon the resignation, release or removal of the Liquidator all books, papers and documents relating to the office of Liquidator must be handed to the Official Receiver or the new Liquidator, as the case may be, and no release can take effect until this has been done (Rule 178). The Board of Trade may, upon the conclusion of the winding up, order that the books and papers shall not be destroyed for a fixed period, not exceeding 5 years from the dissolution of the Company (Rule 203). But any creditor or contributory may appeal against the order to the Court on giving one week's notice to the Board of Trade (Rule 203), and the Court may make an order disposing of the books (S. 283 (1)).

No responsibility shall rest on the Company, the Liquidator or any other person to whom the books and papers have been committed after 5 years from the dissolution of the Company (S. 283 (2)).

### § 18.—The Liquidator's Return.

Where the winding up is not concluded within one year of the Commencement thereof, the Liquidator must send to the Registrar of Companies at stated intervals statements of his receipts and payments in the prescribed form (Form 92) verified by affidavit (Form 93).

The first of these statements must cover the period from the date of a Liquidator's first appointment (*not* the date of the Liquidator's appointment) to the end of the 12 months following the Commencement of the winding up. It must be sent to the Registrar of Companies within 30 days from the expiration of the said 12 months (Rule 194).

Subsequent statements must cover the preceding period of 6 months, and must be sent within 30 days of the expiration of each period (*ibid.*).

The final statement for any period outstanding must be sent when the assets have been fully realised and distributed (*ibid.*).

The statement (Forms 92, 94, 95 and 96) must be verified by affidavit (Form 93) and submitted in duplicate (Rule 194). The rulings prescribed are illustrated on pp. 287 to 289.

## FORM 92.

## LIQUIDATOR'S STATEMENT OF ACCOUNT PURSUANT TO S. 284 OF THE COMPANIES ACT, 1929.

REALIZATIONS				DISBURSEMENTS			
Date	Of whom received	Nature of Assets Realized	Amount	Date	To whom paid	Nature of Disbursements	Amount
		Brought forward	£ s. d.			Brought forward	£ s. d.
		Carried forward				Carried forward	

NOTE.—No balance should be shown on this Account, but only the total Realizations and Disbursements, which should be carried forward to the next Account.

## ANALYSIS OF BALANCE.

	£	s.	d.
Total Realizations .. .. .	..	..	..
„ Disbursements .. .. .	..	..	..
Balance ..	..	..	..

The Balance is made up as follows:—

1. Cash in hands of liquidator .. .. .	£	s.	d.
2. Total payments into Bank, including balance at date of commencement of winding up ( <i>as per Bank Book</i> ) .. .. .	..	..	..
Total withdrawals from Bank .. .. .	..	..	..
Balance at Bank .. .. .	..	..	..
3. Amount in Companies Liquidation Account .. .. .	..	..	..
*4. Amounts invested by liquidator .. .. .	£	s.	d.
Less Amounts realised from same .. .. .	..	..	..
Balance .. .. .	..	..	..
Total Balance as shown above .. .. .	£	..	..

[NOTE.—Full details of Stocks purchased for investment and realization thereof should be given in a separate statement.]

\* The investment or deposit of money by the liquidator does not withdraw it from the operation of S. 285 of the Companies Act, 1929, and any such investments representing money held for six months or upwards must be realised and paid into the Companies Liquidation Account, except in the case of investments in Government securities, the transfer of which to the control of the Board of Trade will be accepted as a sufficient compliance with the terms of the section.



NOTE.—The liquidator should also state—

- |   |   |  |   |   |
|---|---|--|---|---|
| (1) The amount of the estimated assets and liabilities at the date of the commencement of the winding-up. | { | Assets (after deducting amounts charged to secured creditors and debenture holders) .. £ | { | Secured creditors £<br>Debenture holders £<br>Unsecured creditors £ |
| <hr/>   |   |  |   |   |
| (2) The total amount of the capital paid up at the date of the commencement of the winding-up.            | { | Paid up in cash £<br>Issued as paid up otherwise than for cash .. .. £                   |   |   |
| <hr/>   |   |  |   |   |
| (3) The general description and estimated value of outstanding assets (if any).                           | } |  |   |   |
| <hr/>   |   |  |   |   |
| (4) The causes which delay the termination of the winding-up.   | } |  |   |   |
| <hr/>   |   |  |   |   |
| (5) The period within which the winding-up may probably be completed.                                     | } |  |   |   |
| <hr/>   |   |  |   |   |

## FORM 94.

No of Company

## LIQUIDATORS TRADING ACCOUNT UNDER SECTION 284.

(Name of Company)

here the  
of the  
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of the  
iator.

the Liquidator of the above-named Company in account with the Estate.  
This Account is required in Duplicate in addition to Form No. 92.

Dr RECEIPTS.				PAYMENTS. Cr.			
Date.	£	s	d	Date.	£	s	d.
Total £				Total £			

Date

Liquidator.



If no receipts or payments have been recorded during the period to be covered by these statements, the Liquidator must complete Form 92 as far as possible and with it he must send an affidavit of no receipts and payments (Form 93).

Any person stating himself in writing to be a creditor or contributory may, by himself or by his agent, at all reasonable times, on payment of a fee of 1s., inspect the statement after it has been lodged with the Registrar of Companies (S. 284 (2)). Copies or extracts may also be obtained at a fee of 4d. per folio of 72 words or figures (*ibid.*). But any person who untruthfully states that he is a creditor or contributory for this purpose, is guilty of a contempt of Court (S. 284 (3)).

### § 19.—Banking Arrangements.

Unless special leave is obtained for the keeping of an account at a local bank, the Liquidator must pay all moneys received by him into the Companies Liquidation Account at the Bank of England (S. 194 (1)), and must not pay any moneys received by him as liquidator into his private banking account.

No sum of more than £50 should be retained by the Liquidator for more than 10 days without a valid reason, for, if he is unable to explain the retention to the satisfaction of the Board of Trade, he will be charged with interest at the rate of 20 per cent. per annum on the amount whereby the sum retained exceeds £50 (or such other amount as the Board of Trade may have authorised him to retain); while, in addition, his remuneration may be disallowed, he may be removed from office, and he may be held liable for any expenses caused by his default (S. 194 (2)).

Authority to keep an account with some bank other than the Bank of England may be obtained from the Board of Trade, if the Committee of Inspection satisfies the Board that it is for the advantage of the creditors or contributories, either (a) for the purpose of carrying on the business of the Company, or (b) of obtaining advances, or (c) for any other reason (S. 194 (1)).

Application must be made to the Board of Trade on Form 82, which must bear a £1 stamp (*Companies Winding Up (Fees) Order*, 1929). The order made by the Board of Trade requires a £2 stamp (*ibid.*).

The Board may limit the period for which the account may be kept and may at any time order it to be closed if they are of the opinion that it is no longer required (Rule 168).

The rules as to retaining sums of more than £50 apply where a special bank account is kept, and it is further provided that all payments out of the account must be made by cheques, payable to order, marked with the name of the Company, signed by the Liquidator and countersigned by at least one member of the Committee of Inspection *and* by such other person as the Committee may appoint (Rule 168). Such cheques need not be stamped (S. 281).

In no circumstances may the Liquidator pay any money received by him into his private banking account (S. 194 (3)).

#### § 20.—Payment of Balances into the Companies Liquidation Account.

We have already observed (see *ante*, § 19) that the Liquidator is required to pay all moneys received by him into the Companies Liquidation Account at the Bank of England, unless the Board of Trade sanctions the keeping of an account at some other bank. These rules are, however, supplemented by S. 285 of the Act and Rule 196, which require the Liquidator (whether or not a local bank account is kept) to pay to the Companies Liquidation Account at the Bank of England any *money* in his hands or under his control representing:

- (a) unclaimed or undistributed assets of the Company which have remained unclaimed or undistributed for 6 months after the date of their receipt (S. 285 (1)); or
- (b) unclaimed dividends which have remained in the hands or under the control of the Liquidator for 6 months from the date on which they became payable (Rule 196).

In addition, the Liquidator must pay into the Companies Liquidation Account any *moneys* representing unclaimed or undistributed assets or dividends in his hands at the date of the dissolution of the Company, although the moneys have been in his hands for less than 6 months (Rule 196).

Before paying in any money under these rules, the Liquidator must obtain a paying-in order from the Board of Trade (Rule 196), and this order empowers the Bank of England to receive

the money and give the Liquidator a certificate of receipt, which discharges him from liability (S. 285 (1)).

If, after such moneys have been paid into the Companies Liquidation Account, the Liquidator finds it necessary to make payments out of the money, either by way of distribution or in respect of costs, he must make a formal application to the Board of Trade, who may either order payment to be made to him or direct cheques to be issued to him for transmission to the persons to whom the payments are to be made (Rule 201).

If any person, other than the Liquidator (e.g. a creditor entitled to dividend or a contributory entitled to a return of capital), claims moneys paid into the account, he must first obtain from the Liquidator a certificate of his title to the sum claimed, and he must then make a formal application to the Board of Trade (Rule 200).

A fee of 3d. for every £1 or fraction of a pound is charged on all amounts paid out of the account, and in addition the form of application to the Board of Trade must be stamped with a 1s. stamp where the amount applied for does not exceed £1, or a 2s. 6d. stamp where it exceeds £1 (*Companies Winding Up (Fees) Order, 1929*).

### § 21.—Investment of Funds at Bank of England.

If at any time the balance standing to the credit of the Company's account at the Bank of England exceeds the amount which, in the opinion of the Committee of Inspection, is required for the time being to answer demands in respect of the Company's estate, the Board of Trade must, on the request of the Committee (Form 84), invest what is not required in Government Securities (S. 302 (1)). The Liquidator must, in such cases, transmit the Committee's request to the Board of Trade (Rule 171).

If any part of the money so invested is, in the opinion of the Committee, required to answer demands in respect of the Company's estate, the Board of Trade must realise the securities on the request of the Committee (Form 85).

If there is no Committee of Inspection, a request for investment or realisation may be made by the Liquidator, who must state the facts on which his opinion is based (Rule 171).

**§ 22.—Release of the Liquidator.**

A Liquidator obtains his release from the Board of Trade, to whom he may apply therefor:

- (a) when he has realised as much of the Company's property as can be realised without needlessly protracting the liquidation and has distributed a final dividend (if any) to the creditors, and adjusted the rights of the contributories among themselves, and made a final return (if any) to the contributories; or
- (b) when he has resigned; or
- (c) when he has been removed from office (S. 197 (1)).

The application to the Board of Trade for a release must be in prescribed form (Form 99), and notice of his intention to make the application must be given by the Liquidator to all creditors who have proved and to all contributories (Form 98). This notice must be accompanied by a summary of all receipts and payments made by the Liquidator (Form 100).

The Board of Trade, in considering the application, takes into consideration the accounts of the Liquidator and any objections raised by creditors, contributories or other interested persons; but their decision may be made the subject of an appeal to the High Court (S. 197 (1)).

In the event of a release being refused by the Board of Trade, the Court may, on the application of any interested person, make an order charging the Liquidator with the consequences of any act or default of his (S. 197 (2)); but where a release is granted, the Liquidator is discharged from all liability in respect of any act or default (S. 197 (3)).

A release may, however, be revoked and the Liquidator's liability revived, if it has been obtained by fraud or by the suppression or concealment of some material fact (*ibid.*); but the Court will not revoke on the ground of a concealment unless there is evidence of intent to deceive thereby (*re Harris* [1899] 2 Q.B. 97).

Notice of an order of the Board of Trade granting a release must be gazetted, and the fee therefor is payable by the Liquidator; but he may charge the same against the Company's assets (Rule 202).

It is important to remember that the release will not take effect unless and until all books, papers, documents and accounts have been delivered to the Official Receiver or the new Liquidator, as the case may be (Rule 178).

### § 23.—Dissolution of the Company.

The Commencement of a winding up does not terminate the Company's corporate existence, and this continues until dissolution finally takes place. To bring about a dissolution an order of the Court is normally required, and such an order may be made when the winding up has been completed (S. 221 (1)). The Liquidator must report the dissolution order to the Registrar of Companies within 14 days (S. 221 (2)), a heavy penalty being imposed by the Act for a breach of this duty (S. 221 (3)). The Act does not, however, compel a Liquidator to apply for the order and in the past such orders have been made infrequently. It is not clear, moreover, whether a Liquidator who has obtained his release is responsible for the reporting of a dissolution order made subsequently, but, as S. 197 (4) provides that a release shall operate as a removal from office, it seems that he is not; in which case, the Official Receiver, if anybody, is responsible.

Apart from the provisions described above, the Registrar of Companies may, where no returns have been made by the Liquidator for 6 consecutive months, gazette and send to the Company or the Liquidator notice that, at the expiration of a further 3 months, the Company will be struck off the register and dissolved unless cause to the contrary is shown (S. 295 (4)), and this method of bringing about the Company's dissolution is frequently employed.

At any time within 2 years of the dissolution the Court may, however, on the application of the Liquidator or any other interested person, declare the dissolution to have been void, and, on such an order being made, proceedings may be taken as if the Company had not previously been dissolved (S. 294 (1)). Notice of intention to apply to the Court for an order of this nature must be given to the Treasury Solicitor, as the rights of the Crown may be affected thereby (*Home and Colonial Insurance Co.* [1928] W.N. 218), and, within 7 days of the order being made, the person who applied therefor must

file an office copy with the Registrar of Companies, unless a longer period is allowed by the Court (S. 294 (2)). The order will not, however, render valid acts done before it is made (*Morris v. Harris* [1927] A.C. 252).

Furthermore, where dissolution has been brought about by an act of the Registrar of Companies under S. 295 of the Act (see *ante*, § 23), the Court may at any time within 20 years order the Company to be restored to the register and so revive its corporate existence (S. 295 (6)). But application for such a restoration can be made by a member or creditor only, and the rights enjoyed by the revived Company depend upon the terms of the Court's order (*ibid.*).

#### § 24.—Disposition of Assets on Dissolution.

As, upon dissolution, the Company ceases to exist, any undistributed assets that remain or are discovered subsequently can no longer be the property of the Company.

Hence, by S. 296, all property and rights whatsoever vested in or held on trust for the Company immediately before its dissolution (including leaseholds but excluding property held by the Company on trust for any other person) vests on dissolution in the Crown or the Duchy of Lancaster or the Duke of Cornwall as *bona vacantia*.

This rule appears to reverse the decisions in *Hastings Corporation v. Letton* [1908] 1 K.B. 378 (so that a surety for the payment of rent under a lease granted to the Company is no longer discharged by dissolution); and in *re Higginson & Dean* [1899] 1 Q.B. 325 (so that dividends payable by the Trustee in Bankruptcy of a debtor to the Company may now be claimed by the Crown upon dissolution).

It is not clear what happens to property disclaimed by the Liquidator under the power given to him by S. 267 where no vesting order is applied for; but, as the disclaimer terminates the rights, interest and property of the Company (S. 267 (2)), it seems that the subject matter will not be *bona vacantia* under S. 296, in which case a lease will revert to the grantor as before the Act was passed.

#### § 25.—Power of Court to Stay Winding Up.

At any time after a Winding Up Order has been made, the Court may stay the proceedings either altogether or for a



limited time and on such terms as it thinks fit (S. 202 (1)), and may discharge the Winding Up Order (*Patent Automatic Knitting Co.* [1882] W.N. 97). An application for such a stay of proceedings must be made by a creditor or contributory (S. 202 (1)); but no order will be made upon the application of the Company (*Baxters Ltd.* [1898] W.N. 60), and the Court will refuse a stay if the conduct of the directors appears to call for an investigation (*Telescriptor Syndicate* [1903] 2 Ch. 174).

A stay of proceedings may be of use where a compromise is arranged with the creditors or an offer is made for the Company's business, but the Court is not obliged to make the order and will consider the application upon its merits.

## ABSTRACT OF CHAPTER XVII

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### WINDING UP BY THE COURT: DEALINGS WITH CONTRIBUTORIES AND CREDITORS

- § 1.—THE LIST OF CONTRIBUTORIES.
- § 2.—CALLS IN A WINDING UP.
- § 3.—COURT ORDERS AGAINST CONTRIBUTORIES.
- § 4.—RETURN OF CAPITAL TO CONTRIBUTORIES.
- § 5.—CREDITORS' PROOFS.
- § 6.—WHAT DEBTS ARE PROVABLE.
- § 7.—PROOF FOR FUTURE DEBTS.
- § 8.—PROOF FOR CONTINGENT DEBTS.
- § 9.—SECURED CREDITORS.
- § 10.—REVALUATION OF SECURITY.
- § 11.—AVOIDANCE OF FLOATING CHARGES.
- § 12.—FRAUDULENT PREFERENCES.
- § 13.—PROOF FOR INTEREST.
- § 14.—DUTIES OF LIQUIDATOR IN DEALING WITH PROOFS.
- § 15.—FILING PROOFS.
- § 16.—DECLARATION OF DIVIDENDS.
- § 17.—UNCLAIMED DIVIDENDS.
- § 18.—ORDER OF PAYMENT OF DEBTS.
- § 19.—PAYMENTS OF COSTS.
- § 20.—TAXATION OF COSTS.
- § 21.—THE LANDLORD.
- § 22.—EXECUTION CREDITORS.
- § 23.—RIGHTS OF LIQUIDATOR AGAINST THE SHERIFF.
- § 24.—THE PREFERENTIAL DEBTS.
- § 25.—DEFERRED DEBTS.
- § 26.—SET-OFF.



## CHAPTER XVII

# WINDING UP BY THE COURT: DEALINGS WITH CONTRIBUTORIES AND CREDITORS

### § 1.—The List of Contributories.

The Act imposes upon the Court the duty of settling a List of Contributories as soon as possible after a Winding Up Order has been made (S. 203 (1)), unless it appears unnecessary to do so (*ibid.*); but this duty is, by S. 220 and the Winding Up Rules, delegated to the Liquidator, who in this capacity acts as an officer of the Court (Rule 76).

In carrying out this duty, the Liquidator fixes a time and place for settling the List (Rule 78) and gives notice in writing thereof (Form 39) to every person whom he proposes to place on the List (Rule 79). This notice must state:—

- (a) the time and place appointed;
- (b) the character in and number of shares for which the person is to be placed upon the List;
- (c) the amounts called up and paid up on the shares (*ibid.*).

On the day appointed, after hearing any objections that may be offered, the Liquidator settles the list (Rule 80). He must then give notice to every person on the List (Form 42), and must inform each person on the List that any application for the removal of his name or for the variation of the List must be made to the Court by summons within 21 days after the service of the notice (Rule 81). The Court may at its discretion extend the period within which such an application may be made; but, unless special leave is granted, an applicant will not be heard after the 21 days have expired (Rule 82).

The Liquidator may vary or add to the List from time to time (Form 45); but in doing so he must proceed as if he were settling the original List (Rule 83).

It should be observed that persons who are not “shareholders” may be placed on the List, as the term “contributory”

includes "every person liable to contribute to the assets of the Company in the event of its being wound up" (S. 158).

Every past and present "member" of the Company is *prima facie* liable to make a contribution (S. 157 (1)); but:—

- (a) a past member is not liable if he ceased to be a member more than one year before the commencement of the winding up;
- (b) a past member is not liable to contribute in respect of any debt contracted after he ceased to be a member;
- (c) a past member is not liable to contribute unless it appears to the Court that existing members are unable to satisfy the contributions required of them;
- (d) in the case of a limited liability Company, no contribution required from a member shall exceed the amount unpaid on the shares in respect of which he is liable and/or the amount which he has guaranteed to contribute in the event of the Company being wound up.

In general, then, every present member of the Company, and every past member who was a member of the Company within one year before the Commencement of the winding up, should be placed upon the List of Contributories; but past members placed upon the List cannot be required to contribute unless:—

- (a) present members cannot pay the amounts required of them; *and*
- (b) the contributions are required to meet debts contracted before the said past members ceased to be members of the Company.

It was held in *City of London Insurance Co.* [1932] 1 Ch. 266, that where a call is made upon the "B" contributories and the proceeds thereof prove more than sufficient to discharge the debts of the company for which the "B" contributories are liable, the balance must be refunded, and is not available for the general body of creditors.

The term "member" is defined by S. 25 of the Act, which provides that:—

- "(1) The subscribers of the Memorandum of a Company shall be deemed to have agreed to become members of the Company, and, on its registration, shall be entered as members in its register of members.

- (2) Every other person who agrees to become a member of a Company, and whose name is entered in the register of members, shall be a member of the Company."

The register of members is, therefore, the best evidence of membership and liability to contribute in a winding up; but the register is only *prima facie* evidence (S. 102) and a person named therein who has never agreed to become a member cannot be held liable as a member (*Ormerod's Case* [1894] 2 Ch. 475), while a person whose name has been removed unlawfully may be restored thereto (*Massey & Griffin's Case* [1907] 1 Ch. 582).

A member who has been induced to apply for shares by fraudulent misrepresentations in a prospectus is entitled to have his name removed from the register (*ex parte Ward* [1867] L.R.3 Ex. 180); but he must take proceedings before the commencement of the winding up (*Tennent v. City of Glasgow Bank* [1879] 4 App. Ca. 615).

As regards past holders of forfeited shares, if the forfeiture took place within one year before the winding up, the past holder should be placed upon the List as a past member (*Creyke's Case* [1870] 5 Ch. 63); but if more than one year has elapsed since the forfeiture took place, the past holder is not a contributory—though he may still be liable as a debtor for calls made before the forfeiture (*Ladies Dress Association v. Pulbrook* [1900] 2 Q.B. 376); but it is otherwise where the forfeiture was irregular (*Bellerby v. Rowland and Marwood's Steamship Co.* [1902] 2 Ch. 14).

The holders of fully paid shares cannot, normally, be called upon to contribute more than the nominal value of their shares (S. 157 (1)); but as, where the Company's assets exceed its liabilities, the List of Contributories will be resorted to in adjusting the rights of shareholders to the surplus, the holders of fully paid shares may be placed upon the List (*Anglesea Colliery Co.* [1866] 1 Ch. 555).

The estate of a deceased member may be a contributory whether the death takes place before or after the settlement of the List (S. 160); and so may be the Trustee in Bankruptcy of a member (S. 161); subject, however, to his power of disclaimer. And, for so long as the marriage continues, the husband of a female contributory married before the operation

of the Married Women's Property Act, 1882, is liable in respect of shares acquired by her before that date (S. 162).

The term "contributory" may, moreover, include persons other than past and present members of the Company, e.g. directors, where the Memorandum provides that their liability shall be unlimited (S. 157 (2))—though very rarely are directors not members also. But, subject to the Articles, no director or manager is liable to contribute unless the Court considers it necessary; and, in any case, past directors are not liable if:—

- (a) they ceased to be directors more than one year before the commencement of the winding up; or
- (b) all debts contracted before they ceased to be directors have been paid (*ibid.*).

The debt of a contributory accrues when his liability commences, but is not payable until a call is made (S. 159). It takes rank as a specialty debt and is consequently not statute-barred until 20 years after the right of action first accrues, i.e. after a call is made (*ibid.*).

In settling the List of Contributories, the Liquidator must distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others (S. 203 (2)), and he must show upon the List:—

- (a) the address of each contributory;
- (b) the number of shares or extent of interest to be attributed to each contributory;
- (c) the amount called up and the amount paid up in respect of such shares or interest (Rule 78).

It is usual to make out two Lists marked A and B respectively, placing present members on the A List and past members on the B List. The form of List prescribed by the Winding Up Rules is set out on the following page.

## § 2.—Calls in a Winding Up.

The power to make calls on persons who are on the List of Contributories is vested in the Court (S. 206); but the power has been delegated by the Court to the Liquidator (S. 220 and Rule 84). The Liquidator cannot, however, exercise the power unless he first obtains the sanction of the Committee of Inspection or the Court (S. 220).

FIRST PART.—CONTRIBUTORIES IN THEIR OWN RIGHT.

Serial No.	Name.	Address.	Description.	Number of Shares [or extent of Interest].	Amount called up at date of commencement of winding up.	Amount paid up at date of commencement of winding up.

SECOND PART.—CONTRIBUTORIES AS BEING REPRESENTATIVES OF, OR LIABLE FOR THE DEBTS OF, OTHERS.

Serial No.	Name	Address	Description.	In what Character included.	Number of Shares [or extent of Interest].	Amount called up at date of commencement of winding up.	Amount paid up at date of commencement of winding up.

Where there is a Committee of Inspection, the Liquidator must summon a special meeting of the Committee for the purpose of obtaining their sanction. Notice of this must be:—

- (a) Sent to each member of the Committee so that it reaches him not less than 7 days before the date of the meeting.

This notice must contain a statement of the proposed amount of the call and the purpose for which it is intended (Form 46).

- (b) Advertised in (i) a London newspaper, or (ii) a newspaper circulating in the district of the Court which is conducting the winding up, where this is not the High Court.



The advertisement must state the time and place of the meeting and that each contributory may either attend the meeting and be heard, or make any communication in writing to the Liquidator or members of the Committee to be laid before the meeting (Form 47).

Before sanctioning the call, the Committee must hear or consider any communication. It gives its sanction by resolution of a majority of members present (Rule 84).

Where there is no Committee of Inspection, the Liquidator must apply to the Court for leave by summons. This summons must be served on each contributory to be included in the call at least 4 clear days before the day appointed for making the call. But the Court may direct that notice be given by advertisement instead (Rule 85).

A copy of the resolution of the Committee of Inspection, or the order of the Court, sanctioning the call must be served on every contributory included in the call (Form 48 or 52), together with a notice specifying the amount or balance due from the contributory (Form 54 or 55), but neither the resolution nor the order need be advertised unless the Court so directs (Rule 87).

In addition, notice of the call must be filed with the Registrar of the Court (Rule 86; Form 53).

Payment of the call may be enforced by applying to the Court for a Balance Order: the application being made by summons (Rule 88); but a call made before the winding up is a debt which can be recovered by action notwithstanding that a Balance Order has been made (*Westmoreland Slate Co. v. Fielden* [1891] 3 Ch. 15).

It should be observed that it may be necessary to make calls after the creditors have been paid in full in order to adjust the rights of the contributories among themselves (see *post*, § 4), but the procedure in such a case will not be different.

A call may be sanctioned notwithstanding that no debts have yet been proved (*Contract Corporation Ltd.* [1867] 2 Ch. 95).

### § 3.—Court Orders against Contributories.

1. The Court may order any contributory (or any purchaser or other person from whom money is due to the Company)

to pay the amount due into the Bank of England or any branch thereof to the account of the Liquidator (S. 207) and, subject to any right of appeal, an order made on a contributory is conclusive evidence of liability (S. 208).

2. The Court may, at any time either before or after a Winding Up Order, cause a contributory to be arrested and his books and papers and moveable personal property seized, on proof that there is cause to believe that he is about:—

- (a) to quit the United Kingdom; or
- (b) otherwise to abscond; or
- (c) to remove or conceal any of his property for the purpose of evading payment of calls, or of avoiding examination respecting the affairs of the Company (S. 218).

#### § 4.—Return of Capital to Contributories.

After discharging the liabilities of the Company to its creditors, the Liquidator should apply to the Court for leave to distribute surplus assets among the persons entitled thereto (S. 211). This will call for a careful examination of the Company's Memorandum and Articles, for the manner in which the distribution is to be performed will depend upon the terms of these two documents.

In general, the surplus must first be applied in repaying paid up capital to the shareholders; and, if the Memorandum or Articles do not provide otherwise, all shareholders, whether their shares are preferential or not, are entitled to the surplus *pari passu*. But where some shareholders have paid up more than others and the surplus is not sufficient to repay the whole of the amounts paid up, those who have paid more than others must be repaid the excess in full, before any payment is made to the others (*ex parte Maude* [1870] 6 Ch. 51). And, if there is not enough to repay this excess, the Liquidator must make a call on the holders of shares not fully paid in order to equalize the loss of capital (*Anglo-Continental Corporation of Western Australia* [1898] 1 Ch. 327), unless the Articles contain provisions to the contrary (*Kinatan Rubber Co.* [1923] 1 Ch. 120).

The Memorandum or Articles may, however, provide for some other method of distributing the surplus. Thus, it is

sometimes stipulated that, after the payment of creditors, arrears of cumulative preference dividend are to be paid before the repayment of capital is made: or that the amounts paid up on the preference shares are to be repaid before any repayment of capital is made to the ordinary shareholders. But in the absence of some special provision to this effect, preference shareholders are not entitled to arrears of cumulative preference dividend which has not been declared (*Crichton's Oil Co.* [1901] 2 Ch. 184); or to preferential repayment of paid up capital (*Simpson v. Palace Theatre* [1893] 69 L.T. 70).

The problem of distributing what remains after the repayment of the paid up capital has given rise to considerable litigation, for ordinary shareholders are often tempted to endeavour to obtain the whole of this ultimate surplus for themselves to the exclusion of the preference shareholders. In some of the reported cases (*Will v. United Lankat Co.* [1912] 2 Ch. 571; *National Telephone Co.* [1914] 1 Ch. 755; *Colleroy & Co. v. Giffard* [1928] 1 Ch. 144) the ordinary shareholders have been successful, while in other cases (*Espuela Land & Cattle Co.* [1909] 2 Ch. 187; *Frazer & Chalmers Ltd.* [1919] 2 Ch. 755; *Anglo-French Music Co.* [1921] 1 Ch. 386; *Madame Tussaud & Sons Ltd.* [1927] 1 Ch. 657) they have failed: and this has led some writers to declare that there is a conflict of authority on the point. But the cases are not really conflicting, for, in each instance, the Court was called upon to interpret the meaning of the Memorandum and Articles, having regard to the context and the attendant circumstances. In no two cases were the contexts and the circumstances precisely similar, and, for this reason, the precedents must be used with extreme caution.

It is clear that "the annexation to preference shareholders of a right to receive back their capital in a winding up in priority to the ordinary shareholders does not *prima facie* exclude the preference shareholders from participating in the ultimate surplus, if any" (per Astbury J. in *Colleroy & Co. v. Giffard* [1928] 1 Ch. at p. 149); and that "the question depends entirely upon the true construction of the Memorandum and Articles as regards the rights of preference shareholders" (*ibid.*, at p. 148). But a provision in the Memorandum or Articles annexing such a right may be expressed in such a

manner and in such a context that, on a true construction, it does exclude the preference shareholders from participating in the ultimate surplus.

Thus, in the *National Telephone Co.'s Case* (*supra*), where the Memorandum and Articles entitled the preference shareholders to a fixed rate of dividend "and no more," and, in a winding up, to a preferential repayment of capital "but to no other participation in profits," it was held that these words, in the given context, defined the whole of the rights of the preference shareholders and excluded them from participating in the ultimate surplus. In *William Metcalfe & Sons Ltd.* [1932] 49 T.L.R. 23, where the Memorandum and Articles gave the preference shareholders "the" right to a preferential dividend and repayment of capital, it was held that these shareholders were not excluded from participation. This confirmed the decision in *John Dry Steam Tugs Ltd.* [1932] 1 Ch. 594, but over-ruled the decision in *Colleroy & Co. v. Giffard* (*supra*).

In each case, therefore, everything turns upon (i) the wording of the Memorandum and Articles, (ii) the context, and (iii) the attendant circumstances, e.g. the nature of the ultimate surplus; but, with caution, the following general propositions may be applied:—

- (a) In the absence of any express or implied provision to the contrary, all shareholders, including the holders of shares which are preferential as to capital, are entitled to share in the ultimate surplus *pari passu*.
- (b) Where the Memorandum or Articles provide for rights of preference shareholders on a winding up, it is necessary to ascertain, by reference to the context, whether these rights are given solely by way of priority, or whether they denote delimitation also.

If the Memorandum or Articles are so worded as to express the *whole* of the rights of the preference shareholders, i.e. if they denote delimitation as well as priority, the holders of preference shares cannot participate in the ultimate surplus; but if only *part* of their rights are defined, they are entitled to participate *pari passu* with the ordinary shareholders.

### § 5.—Creditors' Proofs.

In a winding up by the Court, every creditor (subject to qualifications to be mentioned) must prove his debt (Rule 89) by delivering or sending through the post to the Official Receiver, or the Liquidator, an affidavit verifying the debt (Rule 90). This affidavit, which may be made by the creditor in person or by some person authorised by or on his behalf (Rule 91), must contain or refer to a statement of account showing the particulars of the debt, and must specify the vouchers, if any, by which the same can be substantiated (Rule 92). These vouchers may be called for by the Official Receiver or the Liquidator (*ibid.*). In addition, (a) trade discounts and (b) any discounts which the creditor has agreed to allow for payment in cash in excess of 5 per cent., must be deducted from the debt (Rule 96), and the affidavit must state whether or not the debt is secured (Rule 93). The affidavit may be sworn before the Official Receiver or Assistant Official Receiver or any authorised officer or clerk to the Board of Trade (Rule 94), or the Liquidator (Rule 109). But the cost of proving must be borne by the creditor, unless the Court otherwise orders (Rule 95).

The form of affidavit prescribed by the Winding Up Rules, 1929, is set out on the following pages.

If signed by a person other than the creditor, the affidavit must state the signatory's authority and means of knowledge (Rule 91).

The following are the qualifications to the rule that every debt must be proved:—

- (a) Unless the Official Receiver or Liquidator otherwise direct, no formal proof need be made in respect of contributions payable during the 12 months before the Winding Up Order by the Company as an employer under the National Health Insurance Acts, 1924 to 1928, the Widows', Orphans' and Old Age Contributory Pensions Act, 1925, or the Unemployment Insurance Acts, 1920 to 1929 (Rule 100).
- (b) Where there are numerous claims for wages by workmen and others employed by the Company, one proof for all the claims may be made by a foreman or some other person, having annexed thereto a schedule setting forth

## FORM No. 59. (Rules 89-94.)

### PROOF OF DEBT. GENERAL FORM.

(Title.)

I (a) \_\_\_\_\_  
of \_\_\_\_\_ in the county of \_\_\_\_\_, make  
oath and say:

(b) That I am in the employ of the under-mentioned creditor, and that I am duly authorised by \_\_\_\_\_ to make this affidavit, and that it is within my own knowledge that the debt herein-after deposited to was incurred and for the consideration stated, and that such debt, to the best of my knowledge and belief, still remains unpaid and unsatisfied.

(c) That I am duly authorised, under the seal of the company hereinafter named, to make the proof of debt on its behalf.

1. That the above-named company was, at the date of the (\*) order for winding-up the same, viz., the            day of            19            , and still is justly and truly indebted to (d)            in the sum of            pounds            shillings and            pence for (e)            as shown by the account endorsed hereon, or by the following account, viz. :—

for which sum or any part thereof I say that I have not nor hath (f)  
or any person by (g) order to my  
knowledge or belief for (g) use had or  
received any manner of satisfaction or security whatsoever, save and  
except the following (h):—

Date.	Drawer.	Acceptor.	Amount.			Due Date.
			£	s.	d.	
Admitted to vote for £ : : the day of 19 . Official Receiver. or Liquidator.						
Admitted to rank for dividend for £ : : this day of 19 . Official Receiver or Liquidator.						

Sworn at \_\_\_\_\_ in the county of \_\_\_\_\_, [Deponent's  
this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ Signature.]  
Before me \_\_\_\_\_

NOTE.—The proof cannot be admitted for voting at the first meeting unless it is properly completed and lodged with the Official Receiver before the time named in the notice convening the meeting.

\* Where before the presentation of the petition for the winding up of a company by the Court, a resolution has been passed by the company for voluntary winding up, the date of the commencement of the winding up (see section 175 of the Companies Act, 1929) must be substituted for the date of the winding-up order.

(a) I name and of de proof credit out and (c by clator, si If b agent pany, (b), me and co-pa trade or, is or a name and of pr

NOTI  
(e) State  
tion [as  
and deliv  
(and mys  
to the co  
ween th  
[or money  
by me in  
the unde  
bill of ex  
as the cas  
(f) "My  
ners or an  
or "the at  
creditor"  
case may  
(g) "My,"  
or "their,"  
(as the ca  
(h) Here  
particular  
securities  
where the  
are on th  
of the com  
the valu  
same, an  
bills or c  
tible spe  
held spec  
the sched  
N.B.—Bil  
change or  
gotiable  
must be  
before th  
be admit

Particulars of Account referred to on the other side.

(Credit should be given for Contra Accounts.)

Date.	Consideration.	Amount.			Remarks. The vouchers (if any) by which the account can be substantiated should be set out here.
		£	s.	d.	

Deponent's Signature

\*[Signature of Commissioner or  
Officer administering oath.]

\* The Companies (Winding Up) Rules, February, 1931, instructs the omission of these words

the names of the workmen and others, and the amounts severally due to them (Rule 101). The form prescribed by the Rules is set out on the following page.

## § 6.—What Debts are Provable.

In dealing with proofs, a distinction has to be made between cases in which the Company is solvent and cases in which it is not.

Where the Company is *solvent*, all claims against the Company are admissible to proof, whether such claims are present or future, certain or contingent, ascertained or sounding only in damages (S. 261). It will be observed, then, that creditors who can prove in the winding up are sometimes debarred from voting at meetings; *viz.* for unliquidated, contingent or unascertained debts (Rule 139, and see Ch. XVI, § 8 (i)).

Where, on the other hand, the Company is *insolvent*, the same rules must be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy (S. 262). As a result of this section, the following

Form No. 60.

### PROOF OF DEBT OF WORKMEN.

(Title.)

I (a)

of

**(a) Fill in full name, address, and occupation of deponent.**

(b)

make an oath and say:

(b) On beha  
of the work  
men and  
others em-  
ployed by t  
above-name  
company.

1 That the above-named company was on the                      day of  
19   , and still is justly and truly indebted to the several persons whose  
names, addresses, and descriptions appear in the schedule endorsed  
hereon in the sums severally set against their names in the sixth column  
of such schedule for wages due to them respectively as workmen or  
others in the employ of the company in respect of services rendered by  
them respectively to the company during such periods as are set out  
against their respective names in the fifth column of such schedule, for  
which said sums, or any part thereof, I say that they have not, nor hath  
any of them had or received any manner of satisfaction or security  
whatsoever.

Sworn at \_\_\_\_\_  
in the county of \_\_\_\_\_  
this \_\_\_\_\_ day of \_\_\_\_\_  
19\_\_\_\_.

Before me \_\_\_\_\_

Deponent's Signature.

SCHEDULE referred to on the other side.

1. No.	2. Full Name of Workman	3. Address.	4. Description.	5. Period over which Wages due.	6 Amount due.		
					£	s.	d.

Signature of Deponent.



debts, which *are* provable where the Company is solvent, are *not* provable where the Company is insolvent:—

- (a) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust;
- (b) Contingent debts and liabilities, the value of which cannot, in the opinion of the Court, be fairly estimated;
- (c) Debts which are not enforceable by legal action, e.g. illegal debts, and debts barred by lapse of time.

In *National Benefit Assurance Co.* [1931] 1 Ch. 46, it was held that balances due under participation agreements which are invalid because they do not comply with the provisions of the Stamp Act, 1891, and the Marine Insurance Act, 1906, cannot be the subject-matter of a proof in the winding up of an insurance company.

In *re Great Orme Tramways*, 50 T.L.R. 450, where a passenger was injured owing to a tramcar getting out of control, it was held that, on the liquidation of the tramways company, the passenger was entitled to prove for damages for breach of contract to carry her safely on the journey. The claim could not be rejected on the ground that it was for unliquidated damages for tort.

### § 7.—Proof for Future Debts.

Where a debt is payable at a future date and is not due until after the Winding Up Order, the creditor may prove for the full amount of the debt as if it were already due. But if a dividend is paid before the date on which the debt is really payable, the Liquidator may deduct therefrom interest at the rate of 5 per cent. per annum computed from the date on which the dividend is declared to the date on which the debt was really payable (Rule 99).

*Example.* A creditor holds a bill of exchange accepted by the Company for a sum of £100. The due date of the bill is 31st December. A Winding Up Order is made against the Company on the preceding 1st July. The creditor proves for £100. On 30th September a dividend of 10s. in the £ is declared. The creditor will receive:—

	£	s.	d.
10s. in the £ on £100 .. .. .	50	0	0
Less 5% p.a. from 30th September to 31st December (3 months) .. .. .		12	6
Balance .. .. .	<u>£49</u>	<u>7</u>	<u>6</u>

### § 8.—Proof for Contingent Debts.

We have already observed (see Ch. XVI, § 8 (i)) that a creditor cannot vote at a meeting of creditors in respect of any unliquidated, or contingent debt or any debt the value of which is not ascertained (Rule 139). But such debts are nevertheless provable in a winding up (S. 261); unless the Company is insolvent *and* :—

- (a) the value of the liability cannot in the opinion of the Court be fairly estimated; *or*
- (b) the claim is in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust (see *ante*, § 6).

Where such debts *are* provable, they should be estimated as far as possible as at the date of the Winding Up Order (S. 261), and if, subsequently when the contingency occurs, it appears that an underestimate has been made, an amended proof may be lodged; but not so as to disturb dividends already declared (per *P.O. Laurence, J.*, in *Trustee of Ellis & Co. v. Dixon Johnson* [1923] B. & C.R., at p. 170).

Examples of claims provable under the laws of bankruptcy are:—

- (a) the contingent claim of a surety who has not yet been called upon to pay (*Blackpool Car Co.* [1901] 1 Ch. 77);
- (b) the contingent claim of a Company in respect of unpaid future calls on its shares (*National Finance Co.* [1868] 3 Ch. 791);
- (c) a landlord's claim in the nature of unliquidated damages for breach of a repairing covenant in a lease (*Hardy v. Fothergill* [1888] 59 L.T. 273).

The valuation of the liability of an Insurance Company to its policy holders is provided for by the Sixth Schedule of the Assurance Companies Act, 1909, and reference should also be made to *Law Car & General Insurance Corporation* [1913] 2 Ch. 103.

### § 9.—Secured Creditors.

A secured creditor—a term which includes a creditor having a right of lien (*Safety Explosives Ltd.* [1904] 1 Ch. 226), and a creditor who has obtained *and served* a garnishee order on the Company's debtor (*National United Investment Corporation* [1901] 1 Ch. 950)—may adopt any one of the following courses:

1. He may rely entirely on his security and submit no proof in the Winding Up.
2. He may *surrender* his security and prove as an unsecured creditor. He is presumed to have surrendered his security if he votes in respect of his whole debt (Rule 139).
3. He may *realise* his security and prove for the balance as an unsecured creditor.
4. He may *value* his security and prove for the balance as an unsecured creditor.

We have already seen that if a secured creditor adopts this last course for the purpose of voting at a meeting of creditors, the Official Receiver or Liquidator may claim the security at its estimated value (sometimes with a 20 per cent. addition) within 28 days (see Ch. XVI, § 8 (j)). This rule applies whether or not the Company is solvent; but where the Company is *insolvent*, by virtue of the laws of bankruptcy (Bankruptcy Act, 1914, Second Schedule, Rules 10–18), the Liquidator may *at any time* redeem the security on payment of its assessed value (Bankruptcy Act, 1914, Sch. II, Rule 13), and in this case no 20 per cent. addition can be claimed by the creditor.

If, moreover, the Liquidator is dissatisfied with the creditor's assessment, he may require the security to be sold; but, if the creditor in writing calls upon the Liquidator to elect whether or not he will redeem the security or require it to be sold, the Liquidator must signify in writing his intention to exercise his powers, within 6 months after receiving the notice. For if he does not, the equity of redemption in the security will vest in the creditor (Bankruptcy Act, 1914, Sch. II, Rule 13).

### § 10.—Revaluation of Security.

We have observed that, during the 28 days after a meeting at which a secured creditor has voted, the creditor may revalue his security provided that he does so before the Official Receiver or Liquidator requires it to be given up (see Ch. XVI, § 8 (j)). This rule applies whether or not the Company is insolvent.

Where, however, the Company is *insolvent*, a creditor who has valued his security may at any time revalue it and amend his proof, if (a) the Liquidator is willing to allow the amendment, or (b) the Court is satisfied that the original valuation was made *bona fide* (Bankruptcy Act, 1914, Sch. II, Rule 14). But in such a case the creditor must repay any surplus dividend he has received by reason of his original valuation being lower than the amended valuation (Bankruptcy Act, 1914, Sch. II, Rule 15).

If, on the other hand, the amended valuation increases the amount of the debt which is unsecured, the creditor cannot disturb dividends already declared; but he is nevertheless entitled to be paid out of any money for the time being available for dividend, any share of dividend he has failed to receive by reason of the inaccuracy of his original valuation (*ibid.*).

*Example.* A creditor for £1,000 holds a security which he values at £800. He proves for £200 as an unsecured creditor, and receives a dividend of 10s. in the £.

- (a) Subsequently he revalues the security at £900. The amount for which he is entitled to prove is, therefore, £100 only.

He has received 10s. in the £ on £200	..	..	£100
He should have received 10s. in the £ on £100			£50

The surplus is repayable	..	..	..	..	£50
--------------------------	----	----	----	----	-----

- (b) If he revalues the security at £700, he will be entitled to prove for £300. He should, therefore, have received as dividend £150, and if the Liquidator has in his hands money for the time being available for dividend, he is entitled to a further £50.

If, having valued his security, the creditor subsequently realises it, the amount realised must be substituted for the amount of the valuation as if an amended valuation had been made (Bankruptcy Act, 1914, Sch. II, Rule 16).

It seems that the creditor's right to revalue his security, where the Company is insolvent, may be exercised after the Liquidator has given notice of his intention to redeem; unless the creditor called upon the Liquidator to elect (*in re Newton* [1896] 2 Q.B. 403).

### § 11.—Avoidance of Floating Charges.

A floating charge on the undertaking or property of a Company which was created within 6 months of the Commencement of the Winding Up is invalid, except to the amount of any cash paid to the Company at the time of or subsequently to the creation of, and in consideration for the charge, together with interest on that amount at the rate of 5 per cent. per annum (S. 266). But this rule will not apply if it is proved that the Company was solvent immediately after the creation of the charge (*ibid.*).

Where money is lent to the Company in consideration of the directors' promise to give a debenture as security, the money may be treated as paid at the time of the creation of the charge, although the execution of the debenture takes place subsequently (*F. and E. Stanton Ltd.* [1929] 1 Ch. 180). But the Liquidator cannot recover money paid in redeeming a debenture which, had it not been redeemed, would have been void under this section (*Parkes Garage Ltd.* [1929] 1 Ch. 139) unless the redemption constitutes a fraudulent preference (*ibid.*).

Under the section a charge securing money lent on condition that it is used to discharge specific liabilities may be avoided (*Orleans Motor Co. Ltd.* [1911] 2 Ch. 41); unless a benefit is obtained by the Company (*Matthew Ellis Ltd.* [1932] Ch. 458).

### § 12.—Fraudulent Preferences.

Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, will, if made or done by or against a Company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly (S. 265 (1)).

Under the Bankruptcy Act, 1914, the subject matter of a fraudulent preference may be recovered if the preference took place within 3 months before the date of the presentation of the Petition, but in a winding up the period runs from the date of the Commencement of the winding up (S. 265 (2)), see *ante*, Ch. XV, § 4.

Apart from this single modification, the rules of bankruptcy apply and cases in bankruptcy may be consulted as precedents.

In *re M.I.G. Trust Ltd.* [1934] A.C. 252, mortgagees having a charge on the assets of the Company had failed to register their charge within the prescribed time, and had applied to the Court for an extension of time; this had been granted, and the Company having briefed counsel to oppose the application, withdrew its opposition before the application was finally heard, and it was held that the withdrawing of the opposition was the "suffering of a judicial proceeding" within the meaning of S. 44, Bankruptcy Act, 1914. But this would not amount to a fraudulent preference unless the liquidator could prove that it was done with the dominant intention to prefer the mortgagees, since where there was room for more than one explanation of the withdrawal of the Company's opposition, the intent to prefer could not be inferred.

It was held in *re Yagerphone, Ltd.* [1935] Ch. 392, where a receiver for debenture-holders had been appointed under a floating charge, that where the liquidator of the Company had recovered money as a fraudulent preference from a creditor to whom payment was made before the appointment of the receiver, the moneys recovered cannot be claimed by the receiver, but are available for the general body of creditors.

### § 13.—Proof for Interest.

In general, a creditor is not entitled to interest upon the amount of his claim unless:—

- (a) interest has been agreed for; or
- (b) the debt carries interest by custom or by virtue of some special rule of law.

No interest can, therefore, be claimed in a winding up as a general rule except in one of these cases; but to this rule there is an important qualification, for a creditor for a debt or sum certain, whereon interest is not reserved or agreed for, and which is overdue at the date of the Commencement of the winding up, is entitled to prove for interest at the rate of 4 per cent. per annum where:—

- (a) the debt is payable at a certain time and by virtue of a written instrument; or
- (b) a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time of payment (Rule 98).

In such cases, the creditor can prove for interest calculated up to the date of the Commencement of the winding up, and from:—

1. the date when the sum was due, where it was payable at a certain time and by virtue of a written instrument;  
or
2. the date of the demand in writing, in other cases (*ibid.*).

Where, on the other hand, interest has been reserved or agreed upon, the right of the creditor is to prove for interest calculated up to the date of the presentation of the petition (*re Agricultural Wholesale Society Ltd.* [1929]); further, as decided in *Parent Trust and Finance Co., Ltd.* [1936], the provisions of S. 66, Bankruptcy Act, 1914, will be followed in the winding up of an insolvent company, and consequently the rate of interest is limited to 5 per cent. If a higher rate is agreed upon with a creditor, any excess beyond 5 per cent. will rank as a deferred claim as in a bankruptcy.

#### § 14.—Duties of Liquidator in dealing with Proofs.

Before the appointment of a Liquidator, the Official Receiver has all the powers of a Liquidator with respect to the examination, admission and rejection of proofs (Rule 110). The Official Receiver may, therefore, deal with proofs received by him and his admission of a proof will bind the Liquidator. But the Official Receiver is not bound to deal with proofs unless he has given notice of his intention to declare a dividend (Rule 114).

On the appointment of the Liquidator all proofs received by the Official Receiver are handed over to the Liquidator, together with a list thereof, and the Liquidator is required to give a receipt therefor (Rule 103).

It is the duty of the Liquidator to examine every proof lodged with him, unless it has already been dealt with by the Official Receiver, and to admit it, or reject it, or require further evidence in support of it (Rule 105). He may admit or reject in whole or in part, but every admission or rejection must be in writing (Form 61), and every rejection must state the grounds thereof (Rule 105). An appeal to the Court may be made by a creditor whose proof has been rejected, but notice of appeal must be given to the Court within 21 days from the service of the notice of rejection (Rule 106).

Within 3 days of receiving from a creditor notice of his intention to appeal, the Liquidator must file the rejected proof with the Registrar of the Court, together with a memorandum of his disallowance thereof (Rule 113).

In general, the admission or rejection of proofs is at the discretion of the Liquidator, but the Court may vary or reverse his decision on the application of any creditor or contributory (Rule 106), and may expunge or reduce a proof on the application of the Liquidator (Rule 107) or a creditor or contributory (Rule 108). A Liquidator who intends to apply to the Court to expunge or reduce a proof must first give notice to the creditor who made the proof (Rule 107).

The Liquidator must deal with proofs within 28 days after receiving the same from the Official Receiver or a creditor; but this rule ceases to operate when notice of intention to declare a dividend has been given (Rule 115): and in any case, the Court may extend the period of 28 days (*ibid.*).

In practice, especially where a Company is insolvent, no final date for receiving proofs is fixed until a dividend is about to be declared; but the Liquidator has power from time to time, unless otherwise ordered by the Court, to fix a day on or before which creditors are to prove their debts and claims, and to establish any title they may have to priority under S. 264 of the Act (Rule 104).

The day so fixed, which must be not less than 14 days after the date of the notice, must be advertised in a newspaper, and notice in writing thereof must be sent to:—

- (a) every creditor mentioned in the Statement of Affairs, who has not yet proved his debt; *and*
- (b) every preferential creditor mentioned in the Statement of Affairs as such, whose claim to preference has not been established and is not admitted (Rule 104).

A creditor who does not prove or establish his claim to preference by the day so fixed is not thereby precluded from proving or establishing his claim subsequently; but he is excluded from any distribution of assets made before he does prove and from objecting to the distribution. This procedure may be used with advantage where payments are about to be made to debenture holders secured by a floating charge; but it does not override the procedure laid down for the declaration or payment of dividends.



### § 15.—Filing Proofs.

The Liquidator must on the first day of every month file with the Registrar of the Court a certified list of all proofs received by him during the preceding month (Form 62). This list must distinguish between (a) proofs admitted, (b) proofs rejected, and (c) proofs held over for further consideration (Rule 112). In addition, where proofs are admitted or rejected, the proofs in question must be filed with the Registrar of the Court (*ibid.*).

The above rule does not apply, however, where the Official Receiver is acting as Liquidator, and in such a case no proofs need be filed until a dividend has been declared (Rule 111).

### § 16.—Declaration of Dividends.

There is no time limit, as there is in bankruptcy, within which a Liquidator must declare a dividend; but it should be done as soon as it appears convenient.

Having decided to declare a dividend, the Liquidator must give notice of his intention so to do:—

- (a) to the Board of Trade, who will gazette the notice (Form 63); and
- (b) to all creditors mentioned in the Statement of Affairs, who have not yet proved their debts (Form 64).

This notice, which must be given not *more* than 2 months before the date on which the dividend is to be declared, must specify a “last day” on or before which proofs must reach the Liquidator, and this “last day” must be at least 14 days after the date of the notice (Rule 117).

All proofs, which have not previously been dealt with, must then be disposed of by the Liquidator or Official Receiver within 14 days after the “last day” fixed by the notice (Rule 115).

We have seen that, where a proof is rejected *before* notice of intention to declare a dividend has been given, the creditor can appeal to the Court at any time within 21 days after receiving notice of the rejection (Rule 106); but this rule does not apply *after* notice of intention to declare a dividend has been given. In such a case (i.e. where a proof is rejected *after* notice of intention to declare a dividend), no appeal to the Court can be made after the “last day” fixed by the notice,

unless notice of appeal is given within 7 days from the date of the service of the rejection of the proof (Rule 117).

If no notice of appeal is given within this time limit, the Liquidator *may* proceed to declare the dividend, excluding the rejected proofs therefrom; but, if notice of appeal is given, the Liquidator should make provision for the dividend upon the rejected proof and the probable cost of the appeal (Rule 117).

On declaring a dividend, the Liquidator must give notice to:—

- (a) the Board of Trade, who will gazette the notice; and
- (b) each creditor whose proof has been admitted (Form 65).

And, in addition, the Liquidator must transmit to the Board of Trade a list of the proofs which have been lodged with the Registrar of the Court under Rule 112 (Forms 66 and 67). In a winding up by the High Court, the Liquidator may also be called upon by the Board of Trade to supply office copies of all lists of proofs filed with the Registrar (Rule 117).

When the winding up is conducted by a Court other than the High Court, the list of proofs must be certified by the Registrar of the Court before it is sent to the Board of Trade (*ibid.*).

Dividends are, in general, payable by the Liquidator at his office; but the creditor may request the amount to be transmitted to him by post (Rule 117); and may request payment to be made to some other person (Form 68).

The date for the declaration of a dividend may be postponed notwithstanding that notice of intention to declare has already been given; but the consent of the Committee of Inspection must be obtained (Rule 117). No further notice of intention to declare need be given to the creditors; but if the new date for the declaration is *more* than 2 months after the date of the original notice of intention, a new notice must be given to the Board of Trade and a new “last day” for receiving proofs must be fixed (*ibid.*).

## § 17.—Unclaimed Dividends.

If any dividends are not claimed within 6 months from the date when they became payable, the Liquidator must, at the expiration of the 6 months, pay the same into the Companies Liquidation Account at the Bank of England after applying for a paying-in order to the Board of Trade (Rule 196). All

unclaimed dividends in the hands of the Liquidator at the date of the dissolution of the Company must also be paid into this account (*ibid.*).

If, subsequently, such dividends are claimed, the claimant must make a formal application to the Board of Trade, supported by the Liquidator's certificate that he is entitled to the dividend concerned (Rule 200). This application must bear the appropriate stamp, *viz.* 1s. where the amount applied for does not exceed £1, or 2s. 6d. where it exceeds £1 (*Companies Winding Up (Fees) Order, 1929*). In addition, a fee of 3d. for each £1 or fraction thereof paid out is charged (*ibid.*).

### § 18.—Order of Payment of Debts.

The Liquidator should apply the moneys obtained by realising the assets of the Company in discharging liabilities in the following order:—

1. Costs and expenses of the winding up.
2. Preferential debts.
3. Ordinary unsecured debts.
4. Deferred debts (if any).

In paying these liabilities, the rights of secured creditors must be observed, and, in general, assets which are charged in favour of secured creditors are not available for any of the foregoing purposes, except in so far as the sum realised by the sale thereof exceeds the sum due to the secured creditors.

To this principle there is, however, an important qualification, for the preferential debts have priority over the claims of debenture holders who are secured by a *floating* charge (S. 264 (4)).

In a compulsory liquidation where the assets are insufficient to discharge the liabilities, the Court has a discretion to order payment of the expenses, including the liquidator's remuneration, in such order as it thinks just; *prima facie* all expenses should be paid prior to remuneration, but the Court has power under S. 171 to provide for remuneration (*Beni Felkai Mining Co. [1934] Ch. 406*).

### § 19.—Payment of Costs.

The costs and expenses of the winding up do not rank *pari passu*, but are payable in the following order of precedence (Rule 192):—

1. Fees and expenses properly incurred in preserving, realising or getting in the assets.
2. The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the Court.
3. The remuneration of the special manager (if any).
4. The costs and expenses of any person who makes or concurs in making, the Company's Statement of Affairs.
5. The taxed charges of any shorthand writer appointed to take an examination: provided that where the shorthand writer is appointed at the instance of the Official Receiver the cost of the shorthand notes shall be deemed to be an expense incurred by the Official Receiver in getting in and realising the assets of the Company.
6. The necessary disbursements of any Liquidator appointed in the winding up by the Court, other than expenses properly incurred in preserving, realising or getting in the assets heretofore provided for.
7. The costs of any person properly employed by any such Liquidator.
8. The remuneration of any such Liquidator.
9. The actual out-of-pocket expenses necessarily incurred by the Committee of Inspection, subject to the approval of the Board of Trade.

Where a Company goes into Voluntary Liquidation and a Winding Up Order is made subsequently, the remuneration, costs and expenses of the Voluntary Liquidator should, if allowed by the Court, be paid with the first of the foregoing groups of charges (Rule 192).

No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers, or other persons, other than payments for costs and expenses incurred and sanctioned under Rule 54 (which concerns the preparation of a Statement of Affairs), and payments of bills which have been taxed and allowed under orders made for the taxation thereof, must be allowed out of the assets of the Company without proof that the same have been considered and allowed by the Registrar. The Taxing Officer before passing the bills or charges of a solicitor must satisfy himself that the appointment of a solicitor to assist the Liquidator in the performance of his duties has been duly sanctioned (*ibid.*).

**§ 20.—Taxation of Costs.**

Upon the request (Form 90) of the Official Receiver or Liquidator, every solicitor, manager, accountant, auctioneer, broker or other person employed in the winding up must submit his bill of costs or charges to taxation (Rule 180), and must supply such copies of the bills as may be required by the Official Receiver or Liquidator on payment of 4d. per folio: which payment may be charged on the assets of the Company (Rule 183).

The Official Receiver or Liquidator, as the case may be, must, on receiving the bill, lodge it with the proper Taxing Officer (Rule 182), who will then give notice of an appointment to tax the same to the Official Receiver, the Liquidator and the person to or by whom the bill is to be paid (Rule 181).

In addition, where the bill is payable out of the assets of the Company it is necessary to supply the Taxing Officer with a written certificate signed by the Official Receiver or the Liquidator, as the case may be, stating whether any, and if so what, special terms of remuneration have been agreed to (Rule 186). And, in the case of a solicitor's bill of costs, it is also necessary to supply a copy of the resolution of the Committee of Inspection or other authority sanctioning the appointment, and the instructions given to the solicitor by the Liquidator (*ibid.*).

As regards the taxation of a sheriff's costs, see § 23 below.

The Official Receiver may call the attention of the Liquidator to any items which, in his opinion, ought to be reduced or disallowed, and may attend or be represented on the taxation (Rule 183).

The Taxing Officer, on completing the taxation, issues a certificate to the Liquidator, and this, together with the bill of costs, must be filed with the Registrar of the Court (Rule 185).

Where the bill is taxed by the Registrar of a Court *other* than the High Court, the Board of Trade may require the taxation to be reviewed by the Taxing Officer of the High Court (Rule 190); the cost thereof being payable out of the assets of the Company or otherwise as directed by the Taxing Officer or the Court (*ibid.*).

### § 21.—The Landlord.

A landlord claiming rent from the Company is neither a preferential creditor nor a secured creditor. He can prove in the winding up for arrears of rent, but his proof ranks as an ordinary unsecured liability.

A distinction should, however, be made between rent accrued due prior to the date of the Winding Up Order, and rent accruing due after that date; for, where the Official Receiver or Liquidator takes possession of the premises for the purposes of the winding up (e.g. to carry on the Company's business, or with a view to selling the lease), the rent which accrues due while the Official Receiver or Liquidator is in possession should be treated as an expense incurred in preserving, realising or getting in the assets and should be paid in full accordingly (see *ante*, § 19).

But, although the Landlord is not a secured creditor, his position is unique by virtue of his right to distrain for his rent, and this right may conveniently be considered at this stage.

In general, a landlord who has levied and completed a distraint for rent before the Commencement of the winding up may retain the proceeds of the distraint and prove for any balance due to him. But there is a qualification to this rule; for, if the distraint is levied within 3 months before the date of the Winding Up Order, the preferential debts are a first charge on the proceeds of the distraint (S. 264 (6)). For this reason, if the remaining assets are insufficient to discharge the preferential debts, the landlord must repay out of the proceeds of his distraint what is required to discharge the balance of the preferential debts.

But where such a repayment has to be made, the landlord is subrogated to the rights of the preferential creditors (*ibid.*).

As regards distrains levied after the Commencement of the winding up, we have already observed that these are rendered void by the making of a Winding Up Order (see Ch. XV, § 2 (c)), and that no distraint can be levied after a Winding Up Order has been made or a Provisional Liquidator appointed, unless the special leave of the Court is first obtained (see Ch. XV, § 2 (d)).

This leave to distrain "after the Winding Up Order will not be granted so as to enable a landlord to obtain an advantage over the other unsecured creditors; but it may be granted in the following cases:—

- (a) Where the Company is a sub-lessee and the head-landlord seeks to distrain; for in this case the head-landlord cannot prove for his rent in the winding up (*Regent United Services Stores Ltd.* [1878] 8 Ch.D. 616).
- (b) Where the assets are fully charged and there will be nothing for the unsecured creditors (*Harpur's Cycle Fittings Co.* [1900] 2 Ch. 731). But if the assets are subject to a floating charge and their value does not exceed the preferential debts, leave to distrain will not be given (*South Rhondda Colliery Co.* [1928] W.N. 126).
- (c) Where the Liquidator takes possession of the premises for the purposes of the winding up; but in this case only rent accrued due since the Winding Up Order can be recovered (*North Yorkshire Iron Co.* [1878] 7 Ch.D. 661).

But no distraint will be allowed merely because the Liquidator has not got rid of the lease (*Oak Pits Colliery Co.* [1882] 21 Ch.D.322), or where he remains in possession by arrangement for the benefit of both parties (*Bridgewater Engineering Co.* [1879] 12 Ch.D. 181).

Where a limited Company as lessee assigns the lease to a third party, and then goes into liquidation, the liquidator must make provision for the liability of the Company for rent under the covenant in the lease, before he distributes the assets of the Company amongst the members (*Smith & Sons (Norwood), Ltd. v. Goodman* [1936] Ch. 216).

## § 22.—Execution Creditors.

A creditor who has issued an execution against the goods or lands of the Company, or has attached a debt due to the Company, cannot retain the benefit of his execution or attachment against the Liquidator, unless he has *completed* his execution or attachment before the Commencement of the winding up (S. 268 (1)).

An execution against goods is deemed to be completed by seizure and sale or receipt of the debt; an execution against

land by seizure; an execution against an equitable interest by the appointment of a receiver; and an attachment of a debt by receipt of the debt (S. 268 (2)). These events must, therefore, take place before the Commencement of the winding up if the creditor is to retain the benefit of his process.

Where, however, a Company, before the Commencement of the winding up, calls a meeting at which a resolution to wind up voluntarily is to be proposed, this rule is modified, for, in such a case, the creditor will not be able to retain the benefit of his execution or attachment if, before the process is completed:—

- (a) a Petition for a Winding Up Order is presented; or
- (b) the creditor receives notice of the calling of the meeting at which it is to be proposed to wind up voluntarily (S. 268 (1)).

But, although the Liquidator is entitled to the proceeds of an execution or attachment which is not completed in time, a person who purchases *goods* from the sheriff acquires a good title to them against the Liquidator (S. 268 (1)).

### § 23.—Rights of Liquidator against the Sheriff.

If, (i) before the sale of goods under an execution, or (ii) before the execution has been completed by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that (a) a Provisional Liquidator has been appointed, or (b) a Winding Up Order has been made, or (c) a Resolution to wind up voluntarily has been passed, the Liquidator may call upon the sheriff to hand over the goods and any money seized or received in part satisfaction of the execution (S. 269 (1)). But the costs of the execution are a first charge on the goods or money (*ibid.*). The sheriff must, however, bring in his bill of costs for taxation within one month of making delivery to the Liquidator; for if he does not, the Liquidator may decline to pay the same (Rule 187).

The costs of execution are limited to the sheriff's costs of execution and do not include costs incurred by the creditor in obtaining execution, e.g. costs of issue and service of the writ (*Woods (Bristol) Ltd.* [1931] 2 Ch. 320).

Subject to the foregoing provisions, where the sum for which the execution is levied does not exceed £20, the sheriff



may hand the money received by him to the creditor as soon as the goods are sold; but, where the sum claimed exceeds £20, the sheriff must retain the proceeds of sale or any money paid to avoid sale for a period of 14 days, after deducting therefrom the costs of the execution (S. 269 (2)).

If, during these 14 days, notice is served on the sheriff that (a) a Petition for a Winding Up Order has been presented, or (b) a Meeting has been called to consider a proposal to wind up voluntarily, and an Order is made or a Resolution is passed, the sheriff must pay the money held by him to the Liquidator, who may retain it as against the execution creditor (S. 269 (2)), even, it seems, where the sale was completed before the Commencement of the winding up.

But this rule does not apply where money is paid to the creditor to avoid an entry by the sheriff (*Bower v. Hett* [1895] 2 Q.B. 337); though it does apply where money is paid to the creditor (instead of to the sheriff) to avoid a sale (*in re Ford* [1900] 1 Q.B. 264). It applies, moreover, where the sheriff has knowledge of the presentation of the Petition, although *formal* notice is not given to him within the 14 days (*in re Harris* [1930] W.N. 190).

Where costs have been deducted by the sheriff under S. 269 (2), the Liquidator may call upon the sheriff in writing to bring in his costs for taxation within 7 days, and may recover any portion of the costs disallowed by the Taxing Officer (Rule 188).

#### § 24.—The Preferential Debts.

The following liabilities, which rank *pari passu inter se*, are the preferential debts to which reference has previously been made:—

- (a) All parochial or other local rates due from the Company at the relevant date, and having become due and payable *within twelve months next before* that date;
- (b) All assessed taxes, land tax, property or income tax assessed on the Company up to the fifth day of April *next before* that date, and not exceeding in the whole one year's assessment;
- (c) All wages or salary (whether or not earned wholly or in part by way of commission) of any clerk or servant in respect of services rendered to the Company during

four months next before the relevant date, not exceeding fifty pounds;

- (d) All wages of any workman or labourer not exceeding twenty-five pounds, whether payable for time or for piece work, in respect of services rendered to the Company during two months next before the relevant date:

Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the relevant date;

- (e) Unless the Company has entered into such a contract with insurers as is mentioned in S. 7, Workmen's Compensation Act, 1925, all amounts due in respect of any compensation or liability for compensation under the said Act accrued before the relevant date;
- (f) All amounts due in respect of contributions payable during the twelve months next before the relevant date by the Company as the employer of any persons under either:—
- (i) the National Health Insurance Acts, 1924 to 1928; or
  - (ii) the Widows', Orphans' and Old Age Contributory Pensions Act, 1925; or
  - (iii) the Unemployment Insurance Acts (S. 264 (1)).

As regards (b), where more than one year's tax is in arrear, the Inland Revenue may claim preference for any one year's tax, provided that it is assessed up to the 5th April *next before* the relevant date, i.e. they are not restricted to the most recent year's tax. And preference may be claimed notwithstanding that the assessment is made after the appointment of a receiver (*Gowers v. Walker* [1930] W.N. 5), or after the Commencement of the winding up (*semble*).

As regards (c), whether a director of the Company is a servant for this purpose, depends upon the nature of his services. Preference has been granted to a director who

edited the Company's publications (*Beeton & Co. Ltd.* [1913] 2 Ch. 279); but refused to a managing director (*Newspaper Proprietary Syndicate* [1900] 2 Ch. 349). And the secretary of a Company may or may not be a servant according to the circumstances (*Cairney v. Back* [1906] 2 K.B. 246). Other instructive cases on the point are *G. H. Morison & Co.* [1911] 106 L.T. 731 (a chemist); *Winter Garden German Opera* [1907] 23 T.L.R. 662 (a singer); *Ashley v. Smith* [1918] 2 Ch. 378 (outside contributors to a newspaper); and *General Radio Co.* [1929] W.N. 172 (a salesman paid by commission). But in each case much depends upon the circumstances.

As regards (c) and (d), if any person has lent money to the Company to enable it to pay its clerks, servants, workmen or labourers, *and* the money has been used to pay such liabilities which, had they not been paid, would have ranked as preferential debts, the lender is subrogated to the preferential rights of the persons so paid. But only to the extent to which the preferential rights of such persons have been diminished (S. 264 (3)).

As regards (e), where weekly payments have been awarded to a workman under the Workmen's Compensation Act, 1925, the lump sum for which the payments could be redeemed by the employer is the amount which ranks as a preferential debt (S. 264 (2)).

In regard to (f) it was held in *A. & B. Tams, Ltd.* [1931] In. R. 87, that any claim for arrears over and above the one year to which preference is given, ranks as an ordinary debt and is *not* payable after preferential creditors but before the ordinary creditors.

The "relevant date" to which the preferential debts are to be calculated is:—

- (a) the date of the Winding Up Order, where the Company is being wound up by the Court and the winding up was *not* preceded by a voluntary winding up ;
- (b) the date of the Resolution to wind up voluntarily, in every other case (S. 264 (7)).

Preferential creditors cannot, therefore, obtain an advantage by obtaining a Winding Up Order against a Company which is already being wound up voluntarily.

The preferential debts are payable out of the assets not

required to discharge the liabilities of the secured creditors, but they are payable after the costs and expenses of the winding up. They are a first charge, however, on assets which are subject to a floating charge (S. 264 (4)), and on the proceeds of any distraint levied within 3 months before the Winding Up Order (S. 264 (6)).

Where debentures are issued creating a fixed charge over some assets and a floating charge over other assets, only the assets subject to the floating charge are subject to the prior rights of the preferential creditors (*Lewis Merthyr Collieries Ltd.* [1929] 1 Ch. 589).

### § 25.—Deferred Debts.

There appears to be only one case in which a debt due from a Company is deferred until all ordinary creditors have been paid. This case is established by S. 157 (1) (g) of the Companies Act, 1929, which provides that a sum due to any member of a Company, *in his character of a member*, by way of dividend, profits or otherwise, shall not be deemed to be a debt of the Company, payable to that member in a case of competition between himself and any other creditor of the Company; but any such sum may be taken into account for the purpose of the final adjustment of the rights of contributories among themselves.

The significance of the words in *italics* is well illustrated by the case of *Annamond Park & Co.* [1930] N.I. 47.

In this case, the Company had five directors, all of whom were employed on terms that they should receive a salary and one-fifth of the Company's profits. One of the directors, A, retired and, in consideration of the cancellation of his service contract, it was agreed that he, or his personal representatives, should receive one-fifth of the profits so long as he (or they) retained his shares. It was also agreed by supplementary contracts, that the other four directors, B, C, D and E, or their personal representatives, should each receive one-fifth of the profits so long as they or their personal representatives retained their shares.

A, B and C died before 1920, but in that year:—

- (a) a sum of £3,000 was credited to directors' deposit accounts, being profits divisible in accordance with the above contracts; and

- (b) under powers given by the Articles, sums of £1,300 were allotted to D and E respectively by way of bonus: these sums also being credited to directors' deposit accounts.

Before any withdrawals had been made from these accounts, the Company went into liquidation, and it was held that, under the section quoted above, the personal representatives of A, B and C could not prove in competition with other creditors for their shares of the £3,000, as these were sums due to them in their character of members. D and E, on the other hand, were allowed to prove both for their shares of the £3,000 and for the sums credited to them by way of bonus, as, at the date of the winding up, they were employed by the Company.

### § 26.—Set-Off.

Where the Company is insolvent, the Liquidator may set-off against any debt owed by the Company a debt due to the Company from the creditor; provided that there is mutuality. All that this means is that the debts must be due to and from the same parties acting in the same capacity. Thus, no set-off is possible:—

- (a) where one debt is joint and the other several (*Kent County Gas Co.* [1913] 1 Ch. 92);
- (b) where an executor owes money as executor and is a creditor in his personal capacity (*Bishop v. Church* [1748] 3 Atk. 691).

If, however, the liabilities of the parties are mutual, debts of a dissimilar nature may be set-off, notwithstanding that they could not be pleaded as a defence to an action. Thus:—

- (a) Unliquidated damages for breach of contract can be set-off against a liquidated liability (*Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* [1884] 9 App. Cas. 434).
- (b) An unsecured debt may be set-off against one which is secured (*McKinnon v. Armstrong* [1877] 2 App. Cas. 531).

A secured creditor who has realised his security before the Commencement of a winding up may set-off against other unsecured liabilities the balance retained by him out of the

sum realised (*H. E. Thorne & Son Ltd.* [1914] W.N. 336); but he cannot do this where his power of sale does not arise until after the Commencement of the winding up (*Young v. Bank of Bengal* [1836] 1 Moo. P.C. 150); and money deposited with a creditor for a specific purpose cannot be set off against debts not connected with that purpose (*City Equitable Fire Insurance Co.* [1930] W.N. 176).

As regards debts due to and from contributories, the Liquidator may set-off against calls a debt owed by the Company to a contributory; but such a debt cannot be set-off by the contributory against calls unless:—

- (a) the liability of the contributory is unlimited, when set-off may be allowed by the Court (S. 205 (2)); or
- (b) all the creditors have been paid in full (S. 205 (3)); or
- (c) the contributory is a bankrupt (*re Duckworth* [1867] 2 Ch. 576).

But no set-off is allowed where the contributory is an insolvent Company in liquidation (*Auriferous Properties Ltd.* [1898] 2 Ch. 428).

Where a contributory assigns his debt, the Liquidator can set-off calls made before he receives notice of the assignment (*Christie v. Taunton Belmard & Co.* [1893] 2 Ch. 175); but he cannot set-off calls made after notice; unless the notice is not given until after the Commencement of the winding up (*China Steamship Co.* [1869] 7 Eq. 240).

A return of capital to a contributory is a debt due from the Company and may be set-off against a debt due from the contributory: but not if, before the Commencement of the winding up, the contributory dies insolvent (*Peruvian Railway Construction Co.* [1915] 2 Ch. 442).

But a contingent liability under a guarantee cannot be set off against a liquidated debt (*Fenton Textile Association* [1930] 143 L.T. 273).



ABSTRACT OF CHAPTER XVIII

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**VOLUNTARY WINDING UP:  
PROCEEDINGS UP TO AND INCLUDING  
THE RESOLUTION**

- § 1.—INTRODUCTORY SUMMARY
- § 2.—PRELIMINARY PROCEDURE IN A MEMBERS' VOLUNTARY WINDING UP.
- § 3.—PRELIMINARY PROCEDURE IN A CREDITORS' VOLUNTARY WINDING UP.
- § 4.—COMMENCEMENT OF A VOLUNTARY WINDING UP.
- § 5.—EFFECT OF A RESOLUTION TO WIND UP.





## CHAPTER XVIII

# VOLUNTARY WINDING UP: PROCEEDINGS UP TO AND INCLUDING THE RESOLUTION

### § 1.—Introductory Summary.

A Company may by resolution go into Voluntary liquidation and this it may do for various reasons, e.g. because its purpose has been fulfilled, or because it is insolvent, or for purposes of reconstruction or amalgamation.

A Voluntary Winding Up may be conducted by the Members of the Company if, in the opinion of the directors, the Company will be able to pay its debts in full within 12 months; but if the directors are not of this opinion, the Winding Up must be conducted by the Creditors in conjunction with the Members.

Whichever method is to be employed, a resolution of the Company in general meeting must be obtained; but, before the meeting is held, certain essential preliminaries must take place, and the preliminary procedure in a Members' Voluntary Winding Up differs materially from the preliminary procedure in a Creditors' Voluntary Winding Up.

### § 2.—Preliminary Procedure in a Members' Voluntary Winding Up.

The first step involves the summoning of a meeting of the directors of the Company in accordance with the provisions of the Articles.

At this meeting a Statutory Declaration (Form 39b, Companies (Forms) Order, 1929) must be made by:

- (a) all the directors where there are not more than 2; or
- (b) a majority of all the directors where there are 3 or more (S. 230 (1)).

This Declaration must state that (a) the signatories have made a full inquiry into the affairs of the Company, and that (b) they have formed the opinion that the Company will be able to pay its debts in full within 12 months of the Commencement of the Winding Up (*ibid.*).

The Declaration must then be filed with the Registrar of Companies, and it is most important to observe that the meeting of the directors must be held, and the Declaration must be filed before the notices of the meeting at which the resolution for the winding up is to be proposed are sent out (*ibid.*). Thus, if a Special Resolution is to be passed at the meeting, the Declaration must be filed more than 21 days before the date on which the meeting is to be held.

A Voluntary Winding Up cannot be conducted by the Members alone unless each and all of these regulations are observed; but where the regulations have been carried out, the directors may proceed to summon a meeting of the Company without giving notice to the Creditors, and the Company may resolve to wind up voluntarily and appoint a Liquidator for the purpose.

If subsequently the Company proves to be unable to pay its debts in full, the winding up proceedings are not necessarily rendered invalid, and there is no machinery whereby, in such an event, a Members' Voluntary Winding Up can be converted into a Creditors' Voluntary Winding Up.

Dissatisfied creditors can, however, apply to the Court to have the winding up conducted under Supervision, or alternatively they can present a Petition for a Winding Up Order. But in practice it may be found more economical to arrange for the resignation of the Members' Liquidator and the appointment of a new Liquidator by the Creditors: a course which is apparently contemplated by the Act (S. 233 (1)).

The directors who sign a Statutory Declaration of solvency may be criminally liable if the Company proves to be insolvent; but not if they made the declaration in good faith.

### **§ 3.—Preliminary Procedure in a Creditors' Voluntary Winding Up.**

If the directors are unable to make the Statutory Declaration described above, notice of the proposal to Wind Up Voluntarily must be given to the Company's creditors, who must be invited to attend a meeting of creditors, which must be held either on the day, or the day next following the day, on which is to be held the meeting of the Company at which the resolution to Wind Up Voluntarily is to be proposed (S. 238 (1)).

Notice of this meeting of the creditors must be:

- (a) sent by post to every creditor; *and*
- (b) advertised in *The Gazette* and 2 local papers circulating in the district in which the Company's registered office or principal place of business is situate (S. 238 (2)).

The Act does not, in so many words, specify what period of notice must be given, but the notices are to be posted to the creditors simultaneously with the sending of notices of the meeting of the Company to the members (S. 238 (1)), so that, if by the Articles, the members are entitled to 14 days' notice, the same notice must be given to the creditors.

Before the meeting of the creditors is held, the directors of the Company must:

- (a) appoint one of their number to take the chair at the meeting; and
- (b) prepare a full statement of the position of the Company's affairs and a list of creditors showing the estimated amount of their claims, to be laid before the meeting (S. 238 (3)).

If the director appointed to take the chair fails to attend the meeting, he may be fined the sum of £100 (S. 238 (6)).

#### § 4.—Commencement of a Voluntary Winding Up.

A Voluntary Winding Up is deemed to commence when the Company passes a resolution to Wind Up Voluntarily (S. 227). This it may do by *Ordinary Resolution* when:

- (a) The period, if any, fixed for the duration of the Company by the Articles expires; or
- (b) The event, if any, occurs, on the occurrence of which the Articles provide that the Company is to be dissolved (S. 225 (1)).

In any circumstances a Company may resolve to Wind Up Voluntarily by *Special Resolution*; but, if the reason for the winding up is the Company's inability to continue its business on account of its liabilities, an *Extraordinary Resolution* will suffice.

Notice of every resolution to Wind Up Voluntarily must be advertised in *The Gazette* within 7 days after it is passed (S. 226), and in addition, within 15 days, a printed copy of the resolution must be filed with the Registrar of Companies (S. 118). A printed copy must now be filed whether the resolution is Ordinary, Extraordinary or Special, and in the event of a failure to advertise or file a resolution, the Liquidator may be penalised (Ss. 118 and 226). The notice of the resolution must be signed by the Chairman of the meeting at which the resolution is passed, and by a solicitor in whose presence it is signed.

### § 5.—Effect of a Resolution to Wind Up.

A Resolution to Wind Up Voluntarily does not dissolve the Company, or destroy its corporate personality, or terminate its powers; but it has the following consequences:—

1. The Company can no longer carry on its business except so far as may be required for the beneficial winding up thereof (S. 228).
2. Any transfer of shares, not being a transfer to or with the sanction of the Liquidator, and any alteration in the status of a member, made after the Commencement, is void (S. 229).
3. The property of the Company must be applied in satisfaction of its liabilities *pari passu*, subject to the rights of preferential creditors, and any surplus must be distributed in accordance with the provisions of the Articles (S. 247).
4. On the appointment of a Liquidator, the powers of the directors cease, except so far as the continuance thereof is sanctioned by:
  - (a) the Company in general meeting or the Liquidator, in a *Members' Voluntary Winding Up* (S. 232 (2)); or
  - (b) the Committee of Inspection, or if there is no such Committee, the Creditors, in a *Creditors' Voluntary Winding Up* (S. 241 (2)).

But the Resolution does not, like a Winding Up Order, affect dispositions of the Company's property, or stay proceedings pending against the Company, or prevent the landlord from levying a distraint. Nor does it constitute the Official Receiver Provisional Liquidator or operate as a discharge of the Company's servants (*Midland Counties District Bank v. Attwood* [1905] 1 Ch. 357), though this last decision was questioned in *Reigate v. Union Manufacturing Co.* [1918] 1 K.B. But contracts, other than contracts of service, may, with the leave of the Court, be rescinded (S. 267 (5)) or, if unprofitable, disclaimed by the Liquidator (S. 267 (1)).



## ABSTRACT OF CHAPTER XIX

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# VOLUNTARY WINDING UP: GENERAL POWERS AND DUTIES OF THE LIQUIDATOR

- § 1.—APPOINTMENT OF A LIQUIDATOR
- § 2.—REMUNERATION OF THE LIQUIDATOR.
- § 3.—RESIGNATION AND REMOVAL OF THE LIQUIDATOR.
- § 4.—RIGHTS UNDER THIRD PARTY INSURANCE POLICIES.
- § 5.—POWERS OF THE LIQUIDATOR.
- § 6.—THE COMMITTEE OF INSPECTION.
- § 7.—COMPROMISES WITH CREDITORS OR CONTRIBUTORIES OR DEBTORS.
- § 8.—TRANSFER OF BUSINESS IN EXCHANGE FOR SHARES
- § 9.—DISCLAIMER OF ONEROUS ASSETS.
- § 10.—BOOKS TO BE KEPT BY LIQUIDATOR
- § 11.—AUDIT OF LIQUIDATOR'S ACCOUNTS
- § 12.—INSPECTION OF BOOKS
- § 13.—DISPOSAL OF BOOKS
- § 14.—THE LIQUIDATOR'S RETURN.
- § 15.—BANKING ARRANGEMENTS
- § 16.—PAYMENT OF BALANCES INTO COMPANIES LIQUIDATION ACCOUNT.
- § 17.—INVESTMENT OF FUNDS AT BANK OF ENGLAND.
- § 18.—MEETINGS IN A VOLUNTARY WINDING UP
- § 19.—PROCEDURE AT MEETINGS—
  - (a) THE FIRST MEETING OF CREDITORS IN A CREDITORS' WINDING UP.
  - (b) ANNUAL MEETINGS OF CREDITORS IN A CREDITORS' WINDING UP.
  - (c) ANNUAL MEETINGS OF THE COMPANY IN A CREDITORS' OR MEMBERS' WINDING UP.
  - (d) FINAL MEETINGS IN A VOLUNTARY WINDING UP
- § 20.—DISSOLUTION OF THE COMPANY.
- § 21.—POWER OF THE COURT TO STAY WINDING UP.





## CHAPTER XIX

# VOLUNTARY WINDING UP: GENERAL POWERS AND DUTIES OF THE LIQUIDATOR

### § 1.—Appointment of a Liquidator.

1. *In a Members' Voluntary Winding Up*, one or more Liquidators must be appointed by the Company in general meeting (S. 232 (1)). This is usually done when the Resolution to wind up is passed.

Within 21 days after his appointment, the Liquidator must give notice of his appointment to the Registrar of Companies (S. 250 (1) and Form 39c, Companies (Forms) Order, 1929), the penalty for default being £5 a day (S. 250 (2)). This notice must be given notwithstanding that the resolution to wind up includes the appointment of the Liquidator and has been gazetted.

Any vacancy in the office of Liquidator may be filled by the Company in general meeting, subject to any arrangement with the creditors, and any contributory or a continuing Liquidator may summon a meeting for this purpose (S. 233); but the Court also may appoint a Liquidator where at any time there is no Liquidator (S. 249 (1)).

2. *In a Creditors' Voluntary Winding Up*, the Liquidator is to be nominated by (a) the Company at the meeting at which it resolves to wind up, and (b) the creditors at the meeting summoned by the Company (S. 239). In the event of the creditors failing to make a nomination, the Company's nominee is to be Liquidator (*ibid.*), and, in the event of different persons being nominated by the two meetings, the creditors' nominee is to be Liquidator (*ibid.*). In this latter case, however, any director, member or creditor may, within 7 days of the nomination by the creditors, apply to the Court for an order that:

- (a) the Company's nominee shall be Liquidator instead of or jointly with the creditors' nominee; or
- (b) some other person shall be Liquidator instead of the creditors' nominee.

The Liquidator must give notice of his appointment to the Registrar of Companies within 21 days, as in a Members' Voluntary Winding Up (Form 39, Companies (Forms) Order, 1929).

Vacancies in the office of Liquidator may be filled by the creditors (S. 242); but not if the original Liquidator was appointed by the Court (*ibid.*). In that case it seems that the Court must fill the vacancy: which it has power to do whenever there is no Liquidator, as in a Members' Voluntary Winding Up (S. 249 (1)).

No security need be given by a Liquidator in a Voluntary Winding Up.

### § 2.—Remuneration of the Liquidator.

1. *In a Members' Voluntary Winding Up*, the remuneration of the Liquidator may be fixed by the Company in general meeting (S. 232 (1)); but it seems that the Court has power to fix remuneration where the Company does not do so (*Carton Ltd.* [1922] 128 L.T. 629).

The remuneration need not be fixed on a percentage basis as in a Winding Up by the Court, but in *re Carton Ltd.* (*supra*) the Court adopted this basis where no remuneration had been fixed by the Company.

2. *In a Creditors' Voluntary Winding Up*, the remuneration may be fixed by the Committee of Inspection, or if there is no such Committee, by the creditors (S. 241 (1)); and, as in a Members' Voluntary Winding Up, it need not be fixed on a percentage basis.

In this case also it seems that the Court may fix remuneration if none is fixed by the Committee of Inspection or the creditors.

A liquidator is not entitled to profit costs if he acts as solicitor for himself and his co-liquidator in a voluntary liquidation (*in re Gerzenstein, Ltd.* [1936] A.E.R. 341).

### § 3.—Resignation and Removal of the Liquidator.

Neither the Act nor the Rules lay down procedure to be followed by a Voluntary Liquidator who wishes to resign, though Ss. 233 (1) and 242 suggest that resignation is possible.

In a *Members' Voluntary Winding Up* it will probably be sufficient if the Liquidator summons a meeting of the Company to receive his resignation; but in a *Creditors' Voluntary*

*Winding Up* it may be advisable, though possibly expensive, to apply to the Court for instructions under S. 252.

On cause shown, the Court may, in any Voluntary Winding Up, remove a Liquidator and appoint another Liquidator (S. 249 (2)).

A Voluntary Liquidator cannot obtain a release from liability like a Liquidator in a Winding Up by the Court.

#### § 4.—Rights under Third Party Insurance Policies.

Where the Company is insured against liabilities to third parties, in the event of a resolution for a Voluntary Winding Up being passed, the Company's rights under the insurance policy will vest in the third parties (S. 1, *Third Parties (Rights against Insurers) Act*, 1930), and, as in a Winding Up by the Court, it becomes the duty of the Liquidator to supply third parties with information, etc. (see Ch. XVI, § 6).

A similar rule applies to insurances against liabilities incurred under the Workmen's Compensation Act, 1925.

#### § 5.—Powers of the Liquidator.

Subject to the qualifications to be set out hereinafter, a Liquidator in a Voluntary Winding Up may, without sanction, exercise any of the powers given by the Act to a Liquidator in a Winding Up by the Court (S. 248 (1)). This gives to the Liquidator not only the powers specified by S. 191 (2) (see *ante*, Ch. XVI, § 7), but also the majority of the powers specified by S. 191 (1) which, in the case of a Winding Up by the Court require the sanction of the Committee of Inspection (see Ch. XVI, § 7).

In a Voluntary Winding Up, subject to the qualifications to be mentioned, no such sanction is required, and, in addition to the powers given by S. 191, the Liquidator can, without sanction:

- (a) settle a List of contributories;
- (b) make calls;
- (c) summon general meetings of the Company (S. 248 (1));
- (d) rectify the register of members (*Taylor, Phillips and Rickard* [1897] 1 Ch. 298);
- (e) adjust the rights of contributories among themselves (S. 248 (2));
- (f) summon meetings of creditors or contributories for the purpose of ascertaining their wishes (S. 192 (2)).

The Liquidator or any creditor or contributory may, moreover, apply to the Court to determine any question arising in the winding up and the Court may, upon such an application being made, exercise all or any of the powers it could exercise were the Company being wound up by the Court (S. 252).

As in a Winding Up by the Court, the Liquidator may be compelled under S. 279 to give notices and make returns, and misfeasance proceedings may be taken against him under S. 276 (see Ch. XVI, § 7).

The qualifications mentioned above, i.e. the powers which a Liquidator cannot exercise in a Voluntary Winding Up unless sanction is obtained, are as follow:—

1. He cannot, without sanction:—
  - (a) pay any class of creditors in full; or
  - (b) make compromises with any creditors, contributories or debtors of the Company (S. 248 (1)).
2. He cannot, without sanction, transfer or sell the business or property of the Company for shares, policies or like interests in some other Company (Ss. 234 and 243).

Where several Liquidators are appointed, the powers given by the Act may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number not less than two (S. 248 (3)).

## § 6.—The Committee of Inspection.

Neither the Act nor the Rules provide machinery for the appointment of a Committee of Inspection in a *Members' Voluntary Winding Up*; but, in a *Creditors' Voluntary Winding Up*, the Creditors may, if they think fit, at the first or any subsequent meeting, appoint a Committee of not more than 5 persons. And, if such a Committee is appointed, the Company also may appoint not more than 5 persons to act as members of the Committee (S. 240 (1)).

It appears that, if the Creditors do not take the initiative, no Committee can be appointed and, on a strict reading of the section, it seems that the Company may appoint 5 persons although the Creditors appoint fewer than 5. Furthermore,

it seems that any person may be appointed whether or not he is a creditor or a contributory.

It should be observed that the Company must appoint its representatives in general meeting, so that where the meeting at which the Company resolves to wind up is held before the meeting of the Creditors, it will be advisable to nominate members tentatively for the Committee in order to save the expense of summoning a second meeting.

The creditors may, however, resolve that all or any of the persons nominated by the Company ought not to be members of the Committee; and, unless the Court otherwise directs, a resolution of this nature renders the "blackballed" nominees incapable of acting (S. 240 (1)). The Court may, however, appoint other persons to act in place of those "blackballed" (*ibid.*), and it seems that the Liquidator may apply to the Court for such an appointment. But this section of the Act is inclined to be obscure.

Subject to the foregoing provisions, the Committee is governed by the rules which govern Committees of Inspection in a Winding Up by the Court: e.g. as to when it must meet (S. 197 (2)); how it shall act (S. 199 (3)); the resignation (S. 199 (4)) and removal of members (S. 199 (5) and (6)); the filling of vacancies (S. 199 (7) and (8)); and the prohibitions as to the conduct of members (Rules 159, 161 and 163): as to which see Ch. XVI, § 9. But it should be observed that, where there is no Committee, the Official Receiver cannot perform its functions as in a Winding Up by the Court.

### § 7.—Compromises with Creditors or Contributories or Debtors.

We have already seen (§ 5 above) that a Voluntary Liquidator cannot, without sanction, pay any class of creditors in full or make compromises with creditors, contributories or debtors, and it remains to be said that the sanction required is:—

- (a) An Extraordinary Resolution of the Company in a *Members' Voluntary Winding Up*; or
- (b) An Order of the Court, or a Resolution of the Committee of Inspection in a *Creditors' Voluntary Winding Up* (S. 248 (1)).

In the case of compromises with *individual* creditors, contributories or debtors, this sanction is all that is required; but additional proceedings must be taken where it is sought to bind all members of a class, including those who will not voluntarily accept the compromise.

This can be done, as in a Winding Up by the Court, by employing the procedure laid down by S. 153 of the Act (see Ch. XVI, § 10). But where it is proposed to make an arrangement with the creditors generally, it is possible to dispense with the leave of the Court by proceeding under S. 251 of the Act.

This section, which applies to a Voluntary Winding Up only, provides that any arrangement with the creditors shall be binding on:

- (a) the Company, if sanctioned by an Extraordinary Resolution; and
- (b) the Creditors, if acceded to by three-fourths in number and value of the Creditors (S. 251 (1)).

But, within 3 weeks of the completion of the arrangement, any creditor or contributory may appeal to the Court against it, and the Court may thereupon amend, vary or confirm the arrangement, as it thinks just (S. 251 (2)). It is not necessary to summon a meeting of the creditors in order to obtain their sanction for an arrangement of this nature and the consent required may be given by letter or even verbally. But S. 251 cannot be applied unless the Company is in or is about to go into Voluntary Liquidation (*Contal Radio Ltd.* [1932] 2 Ch. 66).

### § 8.—Transfer of Business in Exchange for Shares.

Frequently a Company goes into Voluntary Liquidation with a view to reconstructing itself or merging its personality in that of some other Company, and, where this is to be done, the members of the Company in Liquidation are usually invited to accept shares in the reconstructed or absorbing Company in lieu of the cash surplus to which they are entitled. Thus, where the A Company, with a nominal capital of £100,000 divided in 10,000 shares of £10 each, is to be absorbed by the B Company, which contracts to purchase the business of

the A Company at an agreed value of £50,000, the shareholders might be invited to accept, in lieu of cash, one £5 share in the B Company for every £10 share held in the A Company.

In fact, the Liquidator of the Company which goes into Voluntary Liquidation for a purpose of this nature, enters into a contract with the reconstructed or absorbing Company whereby he agrees to sell the business of the Company in Liquidation for shares in the purchasing Company, nominating the members of the Company in Liquidation as allottees of the shares. But where the shares received as the purchase price are to be distributed among the members of the Company in Liquidation, the Liquidator cannot enter into such a contract unless he obtains special sanction, *viz.*:

- (a) *In a Members' Voluntary Winding Up*, sanction of the Company in Liquidation by Special Resolution (S. 234 (1));
- (b) *In a Creditors' Voluntary Winding Up*, sanction of the Court or the Committee of Inspection (S. 243).

The position in a Creditors' Voluntary Winding Up is a little ambiguous, the wording of the sections making it possible to take the view that a Special Resolution is required as well as the sanction of the Court or Committee of Inspection. It is, therefore, advisable to obtain both sanctions until the sections receive judicial interpretation.

In any case, the Special Resolution of the Company may be passed before or concurrently with a resolution to wind up or to appoint a Liquidator (S. 234 (5)); but notice stating that a sale under the section is to be carried out must be given to the members (*Imperial Bank of China v. Bank of Hindustan* [1868] 6 Eq. 91).

If sanction is given as required by the section, all members of the Company are bound by the arrangement (S. 234 (2)); but dissentient members may, within 7 days of the passing of the resolution, serve written notice of dissent upon the Liquidator, requiring him either:

- (a) to abstain from carrying the resolution into effect; or
- (b) to purchase their interests at a price to be determined by agreement or arbitration (S. 234 (3)).



And one of these two options must then be exercised by the Liquidator. But only a dissentient who did not vote in favour of the Special Resolution can take advantage of this subsection.

The notice of dissent must be addressed to the Liquidator and served at the registered office of the Company, and the options given to the Liquidator must be clearly stated (*Demerara Rubber Co.* [1913] 1 Ch. 331). The notice may be given by the executor of a deceased member notwithstanding anything to the contrary in the Articles (*Llewellyn v. Kasintoe Rubber Estates* [1914] 2 Ch. 679), or by a person whose name should be but is not upon the register of members (*Sussex Brick Co.* [1904] 1 Ch. 593). And nothing in the Articles can take the right away from dissentient members (*Payne v. Corke Co.* [1900] 1 Ch. 308).

If the value of a dissentient's interest cannot be agreed, it must be ascertained by reference to an arbitrator appointed in accordance with the provisions of the Companies Clauses Consolidation Act, 1845 (S. 234 (6)), and a dissentient may insist upon arbitration notwithstanding that the Articles provide for the valuation of his shares on a special basis (*Baring-Gould v. Sharpington Pick Syndicate* [1899] 2 Ch. 80).

If the Liquidator elects to purchase a dissentient's shares, he must raise the money as directed by Special Resolution of the Company; and he must pay it to the dissentient before the Company is dissolved (S. 234 (4)), as to which see *post*, § 20.

### § 9.—Disclaimer of Onerous Assets.

The power given to Liquidators by S. 267 may be exercised by a Liquidator in a Voluntary Winding Up whether it be a Members' Winding Up or a Creditors'. For full particulars see Ch. XVI, § 11.

### § 10.—Books to be Kept by a Liquidator.

Neither the Act nor the Rules require a Voluntary Liquidator to keep specific books of account as in a Winding Up by the Court.

In a *Members' Voluntary Winding Up*, the matter is left to the discretion of the Liquidator.

In a *Creditors' Voluntary Winding Up*, the Liquidator must keep such books as he is instructed to keep by the Committee

of Inspection, or if there is no Committee, by the creditors (Rule 170).

### § 11.—Audit of Liquidator's Accounts.

Neither the Act nor the Rules contain specific provisions as to the audit of a Liquidator's accounts in a *Members' Voluntary Winding Up*.

But in a *Creditors' Voluntary Winding Up*, the Liquidator must submit his accounts, together with all books, documents and papers relating to his office or to the Company, to the Committee of Inspection, or if there is no Committee, to the creditors, as and when the Committee, or if there is no Committee, the creditors, direct (Rule 170).

*In any Voluntary Winding Up*, however, the Board of Trade may at any time (whether or not the Winding Up has been concluded) order any person who has acted as Liquidator to submit an account of receipts and payments verified by affidavit and may direct and enforce an audit thereof (Rule 198).

### § 12.—Inspection of Books.

Neither the Act nor the Rules make provision for the inspection of books or documents by creditors or contributories in a Voluntary Winding Up; but it seems that, by making an application to the Court under S. 252 (see *ante*, § 5), a creditor or contributory could obtain an order for inspection under S. 212, as in a Winding Up by the Court.

### § 13.—Disposal of Books.

When the winding up has been completed and the company is about to be dissolved (see *post*, § 20), the books and papers of the Company and the Liquidator may be disposed of:

- (a) *In a Members' Voluntary Winding Up*, as the Company by Extraordinary Resolution may direct; and
- (b) *In a Creditors' Voluntary Winding Up*, as the Committee of Inspection, or, if there is no Committee, the creditors may direct (S. 283 (1)).

As in a Winding Up by the Court, after 5 years from the dissolution of the Company, no person shall be responsible for the safe custody of books or papers (S. 283 (2)).

### § 14.—The Liquidator's Return.

As in a Winding Up by the Court, the Liquidator, in a Voluntary Winding Up, which is not concluded within one year, must make periodic returns of his receipts and payments to the Registrar of Companies as described in Ch. XVI, § 18.

These returns must be made at the stated intervals "until the winding up is concluded," and normally this is deemed to occur when the Company is dissolved (see *post*, § 20). But it is provided expressly by Rule 193 that, if at the date of dissolution any funds or assets of the Company remain unclaimed or undistributed in the hands or under the control of the Liquidator or any person who has acted as Liquidator, the Liquidation shall not be deemed to be concluded until such funds or assets have been either distributed or paid into the Companies Liquidation Account at the Bank of England. Dissolution does not, therefore, discharge the Liquidator from his duty to make returns.

### § 15.—Banking Arrangements.

The limitations on the banking arrangements of a Liquidator in a Winding Up by the Court are not imposed upon Liquidators in a Voluntary Winding Up. The latter need not, therefore, obtain permission to open an account at a bank other than the Bank of England, and may make whatever arrangements seem convenient.

### § 16.—Payment of Balances into Companies Liquidation Account.

As in a Winding Up by the Court (see Ch. XVI, § 20), the Liquidator in a Voluntary Winding Up is required to pay *money* representing unclaimed dividends, or unclaimed or undistributed assets, to the Companies Liquidation Account at the Bank of England.

Unclaimed dividends must be paid in where they have been in the Liquidator's hands or under his control for 6 months from the date when the dividend became payable (Rule 196).

Other moneys representing unclaimed or undistributed assets must be paid in where they have remained unclaimed or undistributed for 6 months after their receipt by the Liquidator (S. 285 (1)); but it is only necessary to pay in the

minimum balance of such moneys which the Liquidator has had in his hands or under his control during the 6 months immediately preceding the date to which the Liquidator's return to the Registrar of Companies is brought down, less such part (if any) thereof as the Board of Trade may authorise him to retain (Rule 196).

It should be observed, moreover, that, in a Voluntary Winding Up, money invested or deposited at interest by a Liquidator is deemed to be money under his control, and, if it forms part of the minimum balance which is payable to the Companies Liquidation Account, the Liquidator must realise the investments or withdraw the deposits (Rule 196). To this last rule, however, an exception is made where any part of the minimum balance is invested in Government securities; for, in this case, the Liquidator may, with the permission of the Board of Trade, transfer the securities to the Board instead of realising them (*ibid.*).

The minimum balance described above must be paid into the Companies Liquidation Account within 14 days after the date to which the Liquidator's return to the Registrar of Companies is brought down (Rule 196); but it must not be forgotten that any moneys (not merely the minimum balance) representing unclaimed or undistributed assets or dividends in the hands of the Liquidator at the date of the dissolution of the Company should be paid into the Companies Liquidation Account (Rule 196).

In order to facilitate the working of these rules, every person who has acted as Liquidator in a Voluntary Winding Up must furnish the Board of Trade with a statement showing what moneys in his hands or under his control represent unclaimed or undistributed assets (Rule 197). This statement must be verified by affidavit (Form 97), and must be furnished whether or not the winding up has been concluded (Rule 197).

In addition, upon the application of the Board of Trade, the Court may order the Liquidator to account for money in his hands and pay any sum payable to the Companies Liquidation Account (S. 285 (2) and Rules 198 and 199).

As regards the withdrawal of moneys paid to the Companies Liquidation Account, see Rules 200 and 201 (Ch. XVI, § 20), which apply as in a Winding Up by the Court.

### § 17.—Investment of Funds at Bank of England.

In a *Creditors' Voluntary Winding Up*, the Committee of Inspection may require the Board of Trade to invest in Government Securities any sum standing to the credit of the account of the Company at the Bank of England, or to realise any securities in which such moneys have been invested (Rule 171); the same rules applying as in a Winding Up by the Court (*see* Ch. XVI, § 21).

In a *Members' Voluntary Winding Up*, as there is no Committee, a request for investment or realisation may be made by the Liquidator (Rule 171).

### § 18.—Meetings in a Voluntary Winding Up.

1. In a *Members' Voluntary Winding Up*, it is not necessary to summon any meeting of the Company's creditors; but the Liquidator has power to summon such meetings if he thinks fit (S. 248 (1), which gives the Liquidator the power conferred on Liquidators in a Winding Up by the Court by S. 192 (2)).

The Liquidator has also power to summon general meetings of the Company at his discretion (S. 248 (1)); but, apart from this power, he is bound to summon a meeting of the Company:

- (a) as soon as may be convenient after the expiration of each period of 12 months for so long as the winding up continues (S. 235 (1)); and
- (b) as soon as may be convenient after the affairs of the Company are fully wound up (S. 236 (1)).

The Court may also direct the Liquidator to summon meetings of creditors or contributories from time to time (S. 288 (1)).

2. In a *Creditors' Voluntary Winding Up*, the Company must, as we have seen, summon a meeting of creditors for the day, or the day after the day, on which the Company meets to resolve to wind up voluntarily; and, in addition, the Liquidator *may* at his discretion summon other meetings of the creditors or the Company from time to time, and *must* summon a meeting of the Company *and a meeting of the creditors* at the end of each year (S. 244), and as soon as the affairs of the Company are fully wound up (S. 245).

As in a Members' Voluntary Winding Up, the Court may from time to time order the Liquidator to summon meetings of creditors or contributories (S. 288).

### § 19.—Procedure at Meetings.

#### (a) *The First Meeting of Creditors in a Creditors' Winding Up.*

This meeting is summoned by the Company for the same day, or the day following the day, on which the resolution to wind up voluntarily is to be considered by the Company (S. 238). The objects of the meeting are:

- (i) to receive and consider the list of creditors and the directors' statement as to the state of the Company's affairs;
- (ii) to nominate a Liquidator;
- (iii) to elect not more than 5 persons as members of a Committee of Inspection.

1. NOTICE. See Ch. XVIII, § 3.

2. CHAIRMAN. A director appointed by the Board of directors for the purpose (S. 238 (3)).

3. QUORUM. As for a meeting of creditors in a Winding Up by the Court (Rule 136, see Ch. XVI, § 8 (c)).

4. ADJOURNMENTS. As for a meeting of creditors in a Winding Up by the Court (Rule 135, see Ch. XVI, § 8 (d)).

5. RESOLUTIONS. By majority in number and value of those present personally or by proxy and voting (Rule 132). Copies of resolutions need *not* be filed with the Registrar of the Court.

6. MINUTES. Minutes and a list of creditors present must be kept and signed as for a meeting in a Winding Up by the Court (Rule 143, see Ch. XVI, § 8 (f)).

7. PROXIES. The same rules apply as in a Winding Up by the Court (Rules 144 to 154, see Ch. XVI, § 8 (g)), subject to the qualification that forms of proxy for use at the meeting must be lodged *at the registered office of the Company* (Rule 152).

A proxy cannot be given to the Official Receiver as such (Rule 150).

8. CORPORATE CREDITORS. As in a Winding Up by the Court (Rule 144, see Ch. XVI, § 8 (h)).

9. CREDITORS' VOTES. Creditors are not required to lodge proofs for the purpose of voting at the first meeting of creditors in a Creditors' Voluntary Winding Up, but it is not made clear whether a creditor may vote in respect of an unliquidated, contingent or unascertained debt. It seems, however, that he cannot (Rule 138).

10. VOTES OF SECURED CREDITORS. Unless a secured creditor intends to surrender his security, he must, if he wishes to vote at the first meeting of creditors, lodge at the registered office of the Company before the meeting a statement giving particulars of the security, the date when it was given and the value at which he assesses it (Rule 142). His vote is then limited to the balance (if any) unsecured (Rule 139), and if he votes at the meeting in respect of his whole debt, he will be deemed to have surrendered his security (*ibid.*).

As in a Winding Up by the Court, the Liquidator may subsequently require the security to be handed over (Rule 140, see Ch. XVI, § 8 (j)).

As regards bills of exchange and promissory notes, Rule 138 applies (see Ch. XVI, § 8 (i)), but it seems that it is not necessary to produce the instrument for marking by the Chairman of the meeting.

(b) *Annual Meetings of Creditors in a Creditors' Winding Up.*

These meetings must be summoned by the Liquidator at the end of the first year from the Commencement of the Winding Up and at the end of each succeeding year (S. 244 (1)). The object of the meeting is to consider an account of the Liquidator's dealings and of the conduct of the winding up during the preceding year (*ibid.*).

1. NOTICE. As for meetings in a Winding Up by the Court (Rule 127, see Ch. XVI, § 8 (a)).

2. CHAIRMAN. The Liquidator or some person nominated by him (Rule 131).

3. QUORUM. As for meetings in a Winding Up by the Court (Rule 136, see Ch. XVI, § 8 (c)).

4. ADJOURNMENTS. As for meetings in a Winding Up by the Court (Rule 135, see Ch. XVI, § 8 (*d*)).

5. RESOLUTIONS. As for the first meeting of creditors.

6. MINUTES. As for the first meeting of creditors.

7. PROXIES. As for meetings in a Winding Up by the Court (Rules 144 to 154, see Ch. XVI, § 8 (*g*)). No proxy may, however, be given to the Official Receiver as such (Rule 150).

8. CORPORATE CREDITORS. As in a Winding Up by the Court (Rule 144, see Ch. XVI, § 8 (*h*)).

9. CREDITORS' VOTES. As for the first meeting of creditors.

10. VOTES OF SECURED CREDITORS. As for the first meeting of creditors; but statements showing the estimated value of the securities must be lodged with the Liquidator and not at the registered office of the Company (Rule 142).

(*c*) *Annual Meetings of the Company in a Creditors' or a Members' Winding Up.*

These meetings must be summoned by the Liquidator at the end of each year to consider his account and the conduct of the winding up (Ss. 235 and 244).

As they are meetings of the Company (and not meetings of contributories) it seems that notice should only be given to persons who are, by virtue of the Company's Articles, entitled to notice of general meetings, and not to all persons on the List of contributories.

The Winding Up Rules do not apply to these meetings, and the procedure is apparently governed by the Articles of Association, e.g. as to what notice must be given, adjournments, voting, proxies, etc.

In a Creditors' Voluntary Winding Up, however, proxies for use at these meetings need not be stamped (S. 281); but it seems that stamps are necessary in a Members' Winding Up.



(d) *Final Meetings in a Voluntary Winding Up.*

In a Creditors' Winding Up, the Liquidator must summon final meetings of the creditors and the Company (S. 245) and in a Members' Winding Up he must summon a final meeting of the Company (S. 236), as soon as the affairs of the Company are fully wound up. The objects of the meetings are:

- (a) to receive and consider the Liquidator's account of the winding up (Ss. 236 and 245);
- (b) to pass a resolution, if necessary, disposing of the books (S. 283).

In a Creditors' Winding Up, the books may be disposed of by the Committee of Inspection, but if this has not been done, a resolution should be passed by the final meeting of the creditors (S. 283). In a Members' Winding Up an extraordinary resolution should be passed at the final meeting of the Company (*ibid.*), and provision therefor should be made in the notice convening the meeting.

It is not necessary to send NOTICE of the final meetings by post to creditors or members of the Company, but notice specifying the time, place and object of the meeting must be advertised in *The Gazette* one month at least before the meeting (Ss. 236 (2) and 245 (2)).

The procedure at these meetings is otherwise the same as that to be observed at the annual meetings of the creditors or the Company.

Within one week of the meetings, the Liquidator must file a return of the holding of the meeting and a copy of his account with the Registrar of Companies (Ss. 236 (3) and 245 (3)), or, if no quorum is present, a return to that effect (*ibid.*).

## § 20.—Dissolution of the Company.

Both in a Members' and in a Creditors' Voluntary Winding Up, the Company is deemed to be dissolved on the expiration of 3 months after the Registrar of Companies has registered the Liquidator's final account and return of the final meeting or meetings, as the case may be (Ss. 236 (4) and 245 (4)).

But, on the application of any interested person, the Court may defer the date of dissolution (*ibid.*). Any person obtaining

from the Court an order deferring the date of dissolution must, within 7 days, deliver an office copy of the order to the Registrar of Companies (Ss. 236 (4) and 245 (4)).

Upon dissolution, any surplus assets of the Company are disposed of as in a Winding Up by the Court (see Ch. XVI, § 24).

**§ 21.—Power of the Court to stay Winding Up.**

S. 252 of the Act empowers the Court to make an order staying the proceedings in a Voluntary Winding Up as it may do in a Winding Up by the Court (*Eastern Investment Co.* [1905] 1 Ch. 352). See also Ch. XVI, § 25.



## ABSTRACT OF CHAPTER XX

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### VOLUNTARY WINDING UP: DEALINGS WITH CONTRIBUTORIES AND CREDITORS

- § 1.—THE LIST OF CONTRIBUTORIES.
- § 2.—CALLS IN VOLUNTARY WINDING UP.
- § 3.—RETURN OF CAPITAL TO CONTRIBUTORIES.
- § 4.—CREDITORS' PROOFS.
- § 5.—DUTIES OF LIQUIDATOR IN DEALING WITH PROOFS.
- § 6.—DECLARATION OF DIVIDENDS.
- § 7.—ORDER OF PAYMENT OF DEBTS.
- § 8.—THE LANDLORD.
- § 9.—EXECUTION CREDITORS.
- § 10.—THE PREFERENTIAL DEBTS.
- § 11.—DEFERRED DEBTS.
- § 12.—SET-OFF.



## CHAPTER XX

# VOLUNTARY WINDING UP: DEALINGS WITH CONTRIBUTORIES AND CREDITORS

### § 1.—The List of Contributories.

In a Voluntary Winding Up, whether it is conducted by the Members or the Creditors, the Liquidator has power to settle a List of Contributories (S. 248 (1)). And the List so settled by the Liquidator is *prima facie* evidence of the liability of the persons named therein as contributories (*ibid.*).

The Liquidator may settle the List as and when he thinks fit; but it is customary, though unnecessary (*Brighton Arcade Co. v. Dowling* [1863] L.R. 3 C.P. 175), to give contributories an opportunity to state their objections, if any, to being placed upon the List.

### § 2.—Calls in Voluntary Winding Up.

In a Voluntary Winding Up, whether it is conducted by the Members or the Creditors, the Liquidator has power to make calls when necessary without obtaining sanction (S. 248 (1)).

Payment of calls may be enforced by order of the Court, as in a Winding Up by the Court (see Ch. XVII, § 2).

### § 3.—Return of Capital to Contributories.

The cases which deal with this troublesome matter apply in a Voluntary Winding Up as well as in a Winding Up by the Court (see Ch. XVII, § 4).

### § 4.—Creditors' Proofs.

In a Voluntary Winding Up, a debt *may* be proved, as in a Winding Up by the Court, by delivering or sending by post to the Liquidator an affidavit verifying the debt (Rule 96); and, if this method is employed, the rules as to the form and contents of proofs in a Winding Up by the Court will apply (see Ch. XVII, § 5). But in a Voluntary Winding Up, the Liquidator may dispense with affidavits if he thinks fit, and accept other evidence of the Company's indebtedness.

As regards the following matters, the rules laid down for use in a Winding Up by the Court must be applied:—

1. As to what debts are provable, see Ch. XVII, § 6.
2. As to proof for future debts, see Ch. XVII, § 7.
3. As to proof for contingent debts, see Ch. XVII, § 8.  
The debts should be estimated as at the date of the resolution to wind up voluntarily
4. As to the right of secured creditors, see Ch. XVII, § 9.
5. As to the avoidance of floating charges, see Ch. XVII, § 11.
6. As to fraudulent preferences, see Ch. XVII, § 12.
7. As to proof for interest, see Ch. XVII, § 13.

#### **§ 5.—Duties of Liquidator in Dealing with Proofs.**

By reason of the fact that the Official Receiver does not act in a Voluntary Winding Up and that a Voluntary Liquidator is not an officer of the Court, the rules for dealing with proofs in a Winding Up by the Court (see Ch. XVII, § 5) do not apply in their entirety to a Voluntary Winding Up.

The Liquidator may, as we have seen, dispense with affidavits of proof, but if proofs are submitted, the Liquidator must admit or reject them in writing as in a Winding Up by the Court (Rule 105). He is not, however, bound to do this within 28 days of receiving the proof, nor does his rejection of a proof oblige the claimant to appeal to the Court within a period of 21 days.

As in a Winding Up by the Court, the decision of the Liquidator may be varied or reversed by the Court on the application of any creditor or contributory (Rule 106); and a proof may also be reduced or expunged upon the application of the Liquidator (Rule 107) or a creditor or contributory (Rule 108).

In addition, as in a Winding Up by the Court, the Liquidator has power from time to time to fix a day on or before which creditors are to prove their debts and claims and to establish any title they may have to priority under S. 264 of the Act (Rule 104). As in a Winding Up by the Court, the day so fixed must be not less than 14 days after the date of the notice, and must be advertised in a newspaper; but in a Voluntary Winding Up, the written notice must be sent to the last known address or place of abode of each person who, to the

knowledge of the Liquidator, claims to be a creditor or preferential creditor of the Company and whose claim has not been admitted (Rule 104). Failure to prove before the fixed date has the same consequences as in a Winding Up by the Court (see Ch. XVII, § 14).

A Voluntary Liquidator need not file proofs with the Registrar of the Court, Rules 111 and 112 applying in a Winding Up by the Court only.

### § 6.—Declaration of Dividends.

Neither the Act nor the Rules provide for the declaration of dividends in a Voluntary Winding Up, and the manner in which payments shall be made to the creditors is accordingly left to the discretion of the Liquidator. Where the Company is solvent, little difficulty is likely to be encountered, but in the case of an insolvent Company, it may be advisable to take advantage of the procedure laid down by Rule 104 (*supra*).

As in a Winding Up by the Court, money representing unclaimed dividends must be paid into the Companies Liquidation Account at the Bank of England (see Ch. XVII, § 17).

### § 7.—Order of Payment of Debts.

The rules for a Winding Up by the Court should be observed in a Voluntary Winding Up, unless the solvency of the Company is certain (see Ch. XVII, § 18); but the rules laid down for the taxation of costs (Rules 190 to 193) and the order of payment of costs (Rule 192) apply only to a Winding Up by the Court. A Voluntary Liquidator may, however, insist upon the taxation of a sheriff's costs, as in a Winding Up by the Court (see Ch. XVII, § 23).

### § 8.—The Landlord.

In a Voluntary Winding Up, a landlord may distrain at any time, unless the Court makes an order staying the distraint under S. 252, as in *Roundwood Colliery Co.* [1897] 1 Ch. 373.

### § 9.—Execution Creditors.

As in a Winding Up by the Court (see Ch. XVII, § 22), an execution creditor cannot retain the proceeds of his execution against a voluntary Liquidator unless his execution is completed



before the Commencement of the Winding Up (S. 268 (1)); but notice that a meeting has been summoned to pass a resolution to wind up voluntarily will defeat the execution creditor if the notice is received by him before the completion of the execution (*ibid.*), even where, subsequently, the execution is completed before the resolution to wind up is passed.

But, as in a Winding Up by the Court, the purchaser of *goods* from the sheriff obtains a good title thereto (S. 268 (1)).

The rights of the Liquidator against the sheriff are as in a Winding Up by the Court (Ch. XVII, § 23) and include the right to the taxation of the sheriff's costs (Rules 187 and 188).

### § 10.—The Preferential Debts.

In a Voluntary Winding Up, debts which are entitled to priority under S. 264 (Ch. XVII, § 24) must be given preference, as in a Winding Up by the Court; subject, however, to the qualification that, if the Company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another Company, no rights of priority are to be enjoyed in respect of:—

- (a) sums due by way of compensation to workmen under the Workmen's Compensation Act, 1925; or
- (b) amounts due in respect of contributions under the National Health Insurance Acts, the Widows', Orphans' and Old Age Contributory Pensions Act, or the Unemployment Insurance Act (S. 264 (1)).

In addition, a landlord who levies a distraint upon the Company's goods cannot be called upon to refund any portion of the proceeds for the benefit of preferential creditors; but, apart from these few modifications, the rules laid down for a Winding Up by the Court apply in a Voluntary Winding Up as well.

### § 11.—Deferred Debts.

S. 157 (1) (g) applies in a Voluntary Winding Up as well as in a Winding Up by the Court (see Ch. XVII, § 25).

### § 12.—Set-Off.

The rules as to set-off stated in Ch. XVII, § 26, apply in a Voluntary Winding Up, as in a Winding Up by the Court.

ABSTRACT OF CHAPTER XXI

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**VOLUNTARY WINDING UP UNDER  
SUPERVISION**

- § 1.—THE OBJECT OF A SUPERVISION ORDER.
- § 2.—HOW a SUPERVISION ORDER IS OBTAINED.
- § 3.—EFFECT OF A SUPERVISION ORDER.
- § 4.—POWERS OF THE LIQUIDATOR.



## CHAPTER XXI

# VOLUNTARY WINDING UP UNDER SUPERVISION

### § 1.—The Object of a Supervision Order.

Where a Company goes into Voluntary Winding Up and the creditors or contributories are dissatisfied with the proceedings, the Court may make an order that the winding up shall be continued under the Supervision of the Court (S. 256). In such a case, the winding up continues to be conducted for the most part as a Voluntary Winding Up; but when the Order for Supervision by the Court is made, the Court may restrict or modify the powers of the Liquidator as it thinks fit. Such orders are, however, rarely made, and in view of the high degree of control which is now vested in the creditors of an insolvent Company, they are likely to be even more uncommon in the future.

### § 2.—How a Supervision Order is Obtained.

A Supervision Order is obtained by presenting a Petition to the Court as in the case of a Winding Up Order. The Petition must be served upon the voluntary Liquidator as well as upon the Company in liquidation (Rule 28), but, otherwise, the rules for the presentation and hearing of Petitions for a Winding Up by the Court must be observed (see Ch. XIV, §§ 2 and 9).

An order will not usually be made upon the Petition of a contributory unless a very strong case for supervision is presented (*Gold & Co.* [1878] 11 Ch.D. 701).

It is important to note that a Supervision Order cannot be made unless the Company has previously resolved to wind up voluntarily. No order can, therefore, be made if the resolution to wind up proves to be invalid (*Bridport Old Brewery Co.* [1867] 2 Ch. 191).

### § 3.—Effect of a Supervision Order.

We have already observed (see Ch. XIX, §§ 5 and 12) that, in a Voluntary Winding Up, the Court has power to control the Liquidator by making such orders as it could have made in a Winding Up by the Court (S. 252) and in the majority of cases the power given by this section renders a Supervision Order unnecessary. It appears, however, that, under S. 252, the Court cannot make general orders, but can deal only with the special case under consideration.

Where, on the other hand, a Petition for a Supervision Order is presented, the Court can impose such terms and conditions as it thinks fit (S. 256).

Among other things, the Court may appoint an additional Liquidator (S. 259 (1)), who will have the same powers and obligations as if he had been appointed under the ordinary rules applicable in a Voluntary Winding Up (S. 259 (2)). And the Court may also remove any Liquidator from time to time, and fill any vacancy occasioned by removal, death or resignation (S. 259 (3)). A Liquidator appointed by the Court must give security as in a Winding Up by the Court (*Hampshire Land Co.* [1894] 2 Ch. 632).

In addition, a Supervision Order operates as a Winding Up Order in that:—

- (a) any disposition of the Company's property, and any transfer of shares or alteration in the status of members, made after the Commencement of the winding up, is void, unless the Court otherwise orders (S. 258, incorporating S. 173); and
- (b) any attachment, sequestration, distress or execution put in force against the estate or effects of the Company after the Commencement of the winding up is void to all intents (S. 258, incorporating S. 174).

In this connection it is necessary to observe that a winding up conducted under the supervision of the Court is deemed to commence at the date on which the Company resolved to wind up voluntarily, and not at the date on which the Petition for a Supervision Order was presented (S. 175 (1)). The order may, therefore, affect materially the rights of a distraining landlord.

#### § 4.—Powers of the Liquidator.

Subject to any restrictions which may be imposed by the Court in making the Supervision Order, the Liquidator may exercise his powers without sanction as if the Company were being wound up altogether voluntarily (S. 260 (1)); but this rule is subject to the important qualification that, after a Supervision Order has been made, the Liquidator cannot (i) pay any classes of creditors in full, or (ii) make compromises with creditors, contributories or debtors of the Company, unless he first obtains:

- (a) where the original winding up was a Members' Voluntary Winding Up, the sanction of the Court; or
- (b) where the original winding up was a Creditors' Voluntary Winding Up, the sanction of the Court or the Committee of Inspection (S. 260 (1), incorporating S. 191 (1)).

The powers of the Liquidator are, therefore, subject to these limitations and subject also to any restrictions imposed by the Court, those of a voluntary Liquidator; but the Supervision Order is nevertheless deemed to be an Order for Winding Up by the Court for all purposes, except the following (S. 260 (2)):

Statement of Company's affairs to be submitted to s. 181.  
Official Receiver.

Report by Official Receiver. S. 182.

Power of Court to appoint Liquidators. S. 183.

Appointment and powers of Provisional Liquidator. S. 184.

Appointment, style, etc., of Liquidators in English Winding Up. s. 185.

Provisions where person other than Official Receiver is appointed Liquidator. s. 186.

Provisions as to Liquidators in Scottish Winding Up. S. 187.

General provisions as to Liquidators. S. 188 except Subs. (5).

Exercise and control of Liquidators' powers in England. S. 192.

Books to be kept by Liquidator in English Winding Up. S. 193.

Payments of Liquidator in English Winding Up into bank. s. 194.

Audit of Liquidators' accounts in English Winding Up. S. 195.

Control of Board of Trade over Liquidators in England. S. 196.

Release of Liquidators in England. S. 197.

Meeting of creditors and contributories to determine s. 198.  
whether Committee of Inspection shall be appointed.

Constitution and proceedings of Committee of s. 199.  
Inspection.

Powers of Board of Trade where no Committee of s. 200.  
Inspection in England.

Additional powers of Committee of Inspection in s. 201.  
Scotland.

Appointment in England of Special Manager. s. 209.

Power in England to order public examination of s. 216.  
promoters, directors, etc.

Power in England to restrain fraudulent persons s. 217.  
from managing companies.

Delegation to Liquidator of certain powers of Court s. 220.  
in England.

Power in England to appoint Official Receiver as s. 307.  
receiver for debenture holders or creditors.

Where, however, a supervision order is made in respect of a Creditors' Voluntary Winding Up *and* a Committee of Inspection has been appointed, S. 199 (2) to (8) and S. 201 are to apply except in so far as they are excluded by rules of Court.

ABSTRACT OF CHAPTER XXII

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**WINDING UP GENERALLY:  
LIABILITIES OF LIQUIDATORS, OFFICERS  
AND MEMBERS**

- § 1.—THE LIABILITIES OF A LIQUIDATOR.
- § 2 —LIQUIDATOR'S DUTY TO GIVE NOTICE OF WINDING UP.
- § 3 —THE LIABILITIES OF OFFICERS IN A WINDING UP
- § 4 —FALSIFICATION OF BOOKS AND FAILURE TO KEEP ACCOUNTS
- § 5 —FRAUDS AND FRAUDULENT TRADING.
- § 6 —MISFEASANCE PROCEEDINGS.
- § 7 —PROSECUTION OF DELINQUENT OFFICERS AND MEMBERS.





## CHAPTER XXII

# WINDING UP GENERALLY: LIABILITIES OF LIQUIDATORS, OFFICERS AND MEMBERS

### § 1.—The Liabilities of a Liquidator.

It is difficult, if not impossible, to define with great precision the legal status of a Liquidator. In a Winding Up by the Court, he is for some purposes (e.g. settling the List of Contributories) an officer of the Court; and as such he may be ordered to refund moneys paid to him under a mistake of law (*Opera Ltd.* [1891] 3 Ch. 260). He is not, however, personally liable for the Company's contracts (*Stead, Hazel & Co. v. Cooper* [1933] 1 K.B. 840). On the other hand, in a Voluntary Winding Up, he is the agent of the Company and his contractual liability to third parties is consequently governed by the law of agency (*Hutcheson v. Eaton* [1884] 13 Q.B.D. 861).

It is, however, the duty of the Liquidator to act for the benefit of the creditors and contributories, and towards these groups he stands in a fiduciary position analogous to that held by a trustee in relation to his *cestui que trustent*. He is therefore liable in damages to a creditor if, having notice of his debt, he distributes the assets without making provision for it (*Argyll's Ltd. v. Coxeter* [1913] 29 T.L.R. 355).

The liability of the Liquidator towards the creditors and contributories is governed, therefore, partly by the law of agency and partly by the law of trusts; but it is necessary to observe that the Liquidator is not a Trustee in the strict sense of the term, since the property of the Company does not vest in him. In addition, under S. 276 (1) of the Act, if it appears that any past or present Liquidator of the Company has misapplied or retained or become liable or accountable for any money or property of the Company, or been guilty of any misfeasance or breach of trust in relation to the Company, the Court may examine into the conduct of the Liquidator and compel him to repay or restore the money or property with interest, or to contribute a sum to the assets of the Company by way of compensation. And an order of this nature may be

made notwithstanding that the Liquidator is also criminally liable (S. 276 (2)).

What is or is not a misfeasance must of necessity depend upon the circumstances of each case; but Liquidators have been held liable for secret profits made by them (*Silkstone and Haigh Moor Coal Co. v. Edey* [1900] 1 Ch. 167); for paying out moneys in settlement of an invalid claim (*Windsor Steam Coal Co.* [1928] 1 Ch. 609); and for admitting to proof and paying dividends upon an unlawful debt (*Home and Colonial Insurance Co.* [1929] W.N. 223). The last two cases suggest that it is unwise for any Liquidator to act without at least a solicitor's advice in cases which may be the subject of a doubt, and a solicitor will probably advise that the point of difficulty be submitted to the Court. If, on the other hand, the Liquidator acts on his own initiative, it appears that he will be held responsible if he fails to display that high degree of legal knowledge which is expected of a solicitor.

## § 2.—Liquidator's Duty to give Notice of Winding Up.

Where a Company is being wound up, whether by the Court or voluntarily or under supervision, every invoice, order for goods or business letter issued by or on behalf of the Company or a Liquidator or a Receiver or Manager of the property of the Company, being a document in which the name of the Company appears, must contain a statement that the Company is being wound up (S. 280 (1)); and, if this requirement is not observed, the Director, Manager, Secretary, Officer, Liquidator or Receiver who knowingly authorises or permits the default is liable to a fine of £20 (S. 280 (2)).

## § 3.—The Liabilities of Officers in a Winding Up.

Where a Company is being wound up, whether the winding up is conducted by the Court or voluntarily, criminal penalties may be incurred by past and present Officers of the Company.

Thus, any past or present Director, Manager or other Officer is guilty of a misdemeanour if he:

- (a) does not to the best of his knowledge and belief fully and truly discover to the Liquidator all the property, real and personal, of the Company, and how and to whom and for what consideration and when the Company disposed of any part thereof, except such part as

has been disposed of in the ordinary way of the business of the Company; or

- (b) does not deliver up to the Liquidator, or as he directs, all such part of the real and personal property of the Company as is in his custody or under his control, and which he is required by law to deliver up; or
- (c) does not deliver up to the Liquidator, or as he directs, all books and papers in his custody or under his control belonging to the Company, and which he is required by law to deliver up; or
- (d) within twelve months next before the Commencement of the winding up, or at any time thereafter, conceals any part of the property of the Company to the value of ten pounds or upwards, or conceals any debt due to or from the Company; or
- (e) within twelve months next before the Commencement of the winding up, or at any time thereafter, fraudulently removes any part of the property of the Company to the value of ten pounds or upwards; or
- (f) makes any material omission in any statement relating to the affairs of the Company; or
- (g) knowing or believing that a false debt has been proved by any person under the winding up, fails for the period of a month to inform the Liquidator thereof; or
- (h) after the Commencement of the winding up prevents the production of any book or paper affecting or relating to the property or affairs of the Company; or
- (i) within twelve months next before the Commencement of the winding up, or at any time thereafter, conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of, any book or paper affecting or relating to the property or affairs of the Company; or
- (j) within twelve months next before the Commencement of the winding up, or at any time thereafter, makes or is privy to the making of any false entry in any book or paper affecting or relating to the property or affairs of the Company; or

- (*k*) within twelve months next before the Commencement of the winding up, or at any time thereafter, fraudulently parts with, alters, or makes any omission in, is privy to the fraudulent parting with, altering, or making any omission in, any document affecting or relating to the property or affairs of the Company; or
- (*l*) after the Commencement of the winding up, or at any meeting of the creditors of the Company within twelve months next before the Commencement of the winding up, attempts to account for any part of the property of the Company by fictitious losses or expenses; or
- (*m*) has within twelve months next before the Commencement of the winding up, or at any time thereafter, by any false representation or other fraud, obtained any property for or on behalf of the Company on credit which the Company does not subsequently pay for; or
- (*n*) within twelve months next before the Commencement of the winding up, or at any time thereafter, under the false pretence that the Company is carrying on its business, obtains on credit, for or on behalf of the Company, any property which the Company does not subsequently pay for; or
- (*o*) within twelve months next before the Commencement of the winding up, or at any time thereafter, pawns, pledges, or disposes of any property of the Company which has been obtained on credit and has not been paid for, unless such pawning, pledging, or disposing is in the ordinary way of the business of the Company; or
- (*p*) is guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the Company or any of them to an agreement with reference to the affairs of the Company or to the winding up (S. 271 (1)).

But no person will be held guilty under this section if he is able to prove that:

- (i) he had no intent to defraud, in cases (*a*), (*b*), (*c*), (*d*), (*f*), (*n*) and (*o*); and

- (ii) he had no intent to conceal the state of affairs of the Company or to defeat the law, in cases (i) and (j) (S. 271 (1)).

In the case of a pawn, pledge or other disposition of the Company's property under case (o), any person who takes in pawn or pledge or otherwise receives the property knowing it to be disposed of in the circumstances described, is also guilty of a misdemeanour (S. 271 (2)).

#### § 4.—Falsification of Books and Failure to Keep Accounts.

Any Director, Manager, other Officer or contributory who destroys, mutilates, alters or falsifies any books, papers or securities, or makes, or is privy to the making of, any false or fraudulent entry in any register, book of account or document belonging to the Company with intent to defraud or deceive any person, is guilty of a misdemeanour (S. 272).

In addition, if it is shown that proper books of account were not kept by the Company throughout the period of 2 years immediately preceding the Commencement of the winding up, every Director, Manager or other Officer who was knowingly a party to or connived at the default is liable to a term of imprisonment; unless he shows that he acted honestly or that the default was excusable in the circumstances in which the business of the Company was carried on (S. 274 (1)).

"Proper books of account" will be deemed not to have been kept unless the Company has kept such books or accounts as are necessary to exhibit and explain the transactions and financial position of the trade or business of the Company, including books containing entries from day to day in sufficient detail of all:—

- (a) cash received and cash paid; and
- (b) where the trade or business has involved dealings in goods, statements of the annual stocktakings; and
- (c) (except in the case of goods sold by way of ordinary retail trade) of all goods sold and purchased, showing the goods and the buyers and sellers thereof in sufficient detail to enable those goods and those buyers and sellers to be identified (S. 274 (2)).

**§ 5.—Frauds and Fraudulent Trading.**

Any person is guilty of a misdemeanour if, being at the time of the offence a Director, Manager or other Officer of the Company, he:—

- (a) has by false pretences, or by means of any other fraud, induced any person to give credit to the Company;
- (b) with intent to defraud creditors of the Company, has made or caused to be made any gift or transfer of or charge on, or has caused or connived at the levying of any execution against, the property of the Company;
- (c) with intent to defraud creditors of the Company, has concealed or removed any part of the property of the Company since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against the Company (S. 273).

In addition, if, in the course of a winding up, it appears that any business of the Company has been carried on with intent to defraud creditors of the Company or creditors of any other person or for any fraudulent purpose, the Court may declare that any past or present Directors of the Company who were knowingly parties to the carrying on of the business in manner aforesaid shall be fully and personally liable for all or any of the Company's liabilities (S. 275 (1)); and may charge his liability on any debt due from the Company to him, or on any mortgage or charge on the assets of the Company held by or vested in him or on his behalf (S. 275 (2)). And a debt or mortgage may be charged in this manner notwithstanding that it is vested in an assignee, unless the assignment was for valuable consideration (other than marriage) given in good faith and without notice of any matters on the ground of which the declaration is made (*ibid.*).

Apart from this liability for the Company's debts, every Director of the Company who was knowingly a party to the carrying on of the business in manner aforesaid is liable to a term of imprisonment (S. 275 (3)); and the Court may also order that the person made liable or imprisoned shall not, without leave of the Court, be a director of or in any way take part in the management of a Company for a period not exceeding 5 years (S. 275 (4)).

An application for a declaration under S. 275 may be made by the Official Receiver, or the Liquidator or any creditor or contributory of the Company (S. 275 (1)); and, at the hearing of the application, the Official Receiver or the Liquidator, as the case may be, may himself give evidence or call witnesses (S. 275 (7)).

It was held in *re Leitch Brothers Ltd.* [1933] Ch. 261, that money recovered by a Liquidator from a Director under S. 275 forms part of the general assets of the Company, and is not available exclusively for the payment of debts contracted while the business was being carried on with fraudulent intent.

### § 6.—Misfeasance Proceedings.

Where in the course of a winding up it appears that any person who has taken part in the formation or promotion of the Company, or any past or present Director, Manager, Liquidator or other Officer of the Company, has (a) misapplied, or (b) retained, or (c) become liable or accountable for any money or property of the Company, or (d) been guilty of any misfeasance or breach of trust in relation to the Company, the Court may, on the application of the Official Receiver, or Liquidator or any creditor or contributory, examine into the conduct of such Promoter, Director, Manager, Liquidator or other Officer and compel him to restore the money or property with interest, or to contribute a sum to the assets by way of compensation (S. 276 (1)).

The Auditor of the Company is an officer within the meaning of this section (*London and General Bank* [1895] 2 Ch. 673); and so is the Secretary (*McKay's Case* [1876] 2 Ch.D. 1); but not so a trustee for debenture holders (*Astley v. New Tivoli Co.* [1899] 1 Ch. 151).

As to the nature of a misfeasance in respect of which proceedings may be taken, it is difficult to extract general principles from the cases; but orders under the section have been made where:—

- (a) dividends have been paid out of capital (*Moxham v. Grant* [1900] 1 Q.B. 88);
- (b) funds have been used for *ultra vires* objects (*Joint Stock Discount Co. v. Brown* [1869] 8 Eq. 381);



- (c) a secret profit has been made by a promoter (*Gluckstein v. Barnes* [1900] App. Ca. 240);
- (d) commissions have been received improperly (*Metcalf's Case* [1880] 13 Ch.D. 169);
- (e) assets have been sold deliberately for less than their real value (*New Travellers' Chambers Ltd.* [1895] 12 T.L.R. 529).

The Court has power, however, to relieve any person against whom misfeasance proceedings are taken (S. 372); a power which was exercised in *Home and Colonial Insurance Co.* [1929] 44 T.L.R. 658.

### § 7.—Prosecution of Delinquent Officers and Members.

In a *Winding Up by or subject to the Supervision of the Court*, either on the application of an interested person or of its own motion, the Court may direct the Liquidator to prosecute any past or present Director, Manager or other Officer or any member of the Company who appears to have been guilty of any criminal offence in relation to the Company (S. 277 (1)). Or alternatively, the Court may direct the Liquidator to refer the matter to the Director of Public Prosecutions (*ibid.*).

In a *Voluntary Winding Up*, it is the duty of the Liquidator to make a report to the Director of Public Prosecutions if it appears that any past or present Director, Manager, or other Officer, or any member of the Company is guilty of a criminal offence in relation to the Company (S. 277 (2)); and, if no such report is made, the Court may, on the application of any interested person or of its own motion, direct the Liquidator to make the report (S. 277 (5)). In either case, the Liquidator must furnish the Director of Public Prosecutions with such information, and must give him such access to and facilities for inspecting and taking copies of any documents, being information or documents in the possession or control of the Liquidator and relating to the matter in question, as he may require (S. 277 (2)); and the Director of Public Prosecutions may, if he thinks fit, refer the matter to the Board of Trade for further enquiry (S. 277 (3)). If the Director of Public Prosecutions is of the opinion that the case is not one in which he ought to take proceedings, he must inform the Liquidator accordingly, and the Liquidator may then take proceedings

himself, provided that he first obtains the sanction of the Court (S. 277 (4)).

If, on the other hand, in *any winding up* the Director of Public Prosecutions decides to take proceedings, the Liquidator and every Officer and agent of the Company, past and present (other than the defendant in the proceedings), must give him reasonable assistance (S. 277 (6)), and, if this assistance is not given, the Court may, upon the application of the Director of Public Prosecutions, order the person concerned to comply with the subsection, and, where the person concerned is a Liquidator, may charge him with the costs of the application, unless his failure to comply with the subsection was due to his having insufficient assets in his hands (S. 277 (7)).

Subject to any mortgages or charges on the assets of the Company and any debts to which priority is given by S. 264, the costs and expenses incurred by the Liquidator in proceedings brought by him under S. 277 are payable in priority to all other liabilities; but, with the consent of the Treasury, the Board of Trade may direct that the whole or any part of the expenses shall be defrayed as expenses incurred by the Board in relation to a winding up, thus bringing into operation S. 13 (3) of the *Economy (Miscellaneous Provisions) Act, 1926* (S. 277 (8)).



## ABSTRACT OF CHAPTER XXIII

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### ARRANGEMENTS AND RECONSTRUCTIONS

- § 1.—COMPROMISES OR ARRANGEMENTS UNDER S. 153.
- § 2.—ARRANGEMENTS WITH CREDITORS IN VOLUNTARY LIQUIDATION.
- § 3 —COMPROMISES IN LIQUIDATIONS GENERALLY.
- § 4 —RECONSTRUCTIONS
- § 5 —ARRANGEMENTS FACILITATING RECONSTRUCTIONS OR AMALGAMATIONS.
- § 6 —ACQUISITION OF SHARES OF DISSENTING SHAREHOLDERS UNDER S. 155



## CHAPTER XXIII

# ARRANGEMENTS AND RECONSTRUCTIONS

### § 1.—Compromises or Arrangements under S. 153.

Where *for any reason* a company desires to effect a compromise or arrangement with—

- (i) its creditors, or any class of them; or
- (ii) its members, or any class of them;

the Court may, on the application in a summary way of—

- (a) the company; or
- (b) any creditor or member of the company; or
- (c) the liquidator, if the company is being wound up;

order a meeting of the creditors, or class thereof, or members, or class of members, as the case may be, to be summoned in such manner, e.g. by advertisement or/and notices in compliance with the Articles, as the Court may direct (ss. 1).

Failure to comply with the directions of the Court may render the meetings invalid, although the Court has sometimes waived informalities, e.g. where a company inadvertently omitted to advertise the meeting as had been directed (*Anglo-Spanish Tartar Refineries* [1924] W.N. 222).

At the meeting(s), the proposals must be agreed to by **a majority in number representing three-fourths in value** of the creditors, or class, or members, or class, as the case may be, **present and voting** either in person or by proxy at such meeting(s). If the requisite majority is obtained, the compromise or arrangement will, if sanctioned by the Court on application, be binding on:—

- (1) ALL the creditors, or class, or members, or class, as the case may be; and
- (2) the company, or, if the company is being wound up, the liquidator and all the contributories (ss. 2).

Regard must be had to the rights of the various creditors

or members in determining whether particular persons should constitute a separate class: each class should represent *a substantial unity of interests*. Thus, it may be essential to distinguish secured from unsecured creditors. The holders of shares paid up in advance of calls should be treated as a separate class of members (*United Provident Assurance Co.* [1910] 2 Ch. 477). If there are persons who belong to more than one class, they may attend and vote at the meetings of each class (*Madras Irrigation Co.* [1881] W.N. 172), and the meetings should therefore not clash as to time, although they are usually held at the same place and on the same day.

In considering the scheme, the Court must consider whether the meeting was representative of the class concerned, and whether the majority voted in good faith; thus, it may refuse its sanction if it is of the opinion that the majority were attempting to promote interests which were not beneficial to the creditors as a whole (*Alabama Co.* [1891] 1 Ch. 213). The Court may also have regard to the interests of dissentients, e.g. may require them to be protected.

No order under ss. (2) will be effective until an office copy thereof has been filed with the Registrar of Companies. A copy of the order must be annexed to every copy of the Memorandum [or instrument constituting or defining the constitution of the company if it has no Memorandum] issued after the order has been made (ss. 3). The default fine is £1 for each copy in respect of which default is made (ss. 4).

It must be noted that, in this Section, "company" means any company liable to be wound up under the Act. The expression "arrangement" will include a re-organisation of the share capital of a company by—

- (i) the *consolidation* of shares of different classes; and/or
- (ii) the *division* of shares into shares of different classes (ss. 5).

## § 2.—Arrangements with Creditors in Voluntary Liquidation.

Any arrangement entered into between a company about to be, or in course of being, wound up *voluntarily*, and its creditors is binding on—

- (a) the company, if sanctioned by an Extraordinary Resolution; and
- (b) all the creditors, if acceded to by **three-fourths in number and value of the creditors** (S. 251 (1)).

Meetings of creditors are advisable, but not essential, so long as all the facts are laid before them before they come to a decision.

Any creditor or contributory may, within 3 weeks from the completion of the arrangement, appeal to the Court against the scheme, and the Court may thereupon, as it thinks just, amend, vary, or confirm the arrangement (S. 251 (2)).

### § 3.—Compromises in Liquidations Generally.

The liquidator may make compromises with *individual* creditors or contributories, provided he obtains the sanctions stated hereunder:—

- (1) *Compulsory Winding-Up*. Of either the Court or the Committee of Inspection (S. 191 (1)).
- (2) *Members' Voluntary Winding-Up*. Of an Extraordinary Resolution of the company (Ss. 234 and 248 (1)).
- (3) *Creditors' Voluntary Winding-Up*. Of either the Court or the Committee of Inspection (Ss. 243 and 248 (1)).
- (4) *Supervision Winding-Up*. Of the Court; but where before the Supervision Order it was a Creditors' Winding-Up, of either the Court or the Committee of Inspection (S. 260 (1)).

### § 4.—Reconstructions in Voluntary Liquidation.

A reconstruction takes place where a company goes into liquidation in order to sell or transfer its undertaking and assets to another company formed for the purpose. As consideration for the undertaking, the purchasing company usually issues shares to the selling company, which passes them on to its own members, with the result that the members acquire shares in the new company in exchange for their shares in the old company. In this manner, it is possible in effect to extend the objects, to obtain new capital, to reduce capital, and to



perform numerous other operations which would otherwise be difficult or impossible.

But a liquidator must not receive as whole or part compensation for a transfer of assets any shares, policies or other like interests in the transferee company unless he is authorised so to do by a special resolution of the transferor company (S. 234); and in the case of a Creditors' Voluntary Winding-up he must also obtain the sanction of the Committee of Inspection or the Court (S. 243).

Moreover, any member who is averse to the intended transfer and who does not vote in favour of the special resolution may, by leaving at the registered office of the transferor company within seven days after the passing of the resolution, a written dissent addressed to the liquidator, require the liquidator either:

- (a) to abstain from carrying the resolution into effect; or
- (b) to purchase his interest at a price to be determined by agreement or arbitration (S. 234 (3)).

This right of a dissentient member cannot be taken away or restricted by the Articles (*Payne v. Corke Co* [1900] 1 Ch. 308); nor is a member bound by provisions in the Articles fixing the price at which his shares may be purchased (*Baring-Gould v. Sharpington Pick & Shovel Co.* [1899] 2 Ch. 80); and the personal representatives of a deceased member may exercise the rights which are enjoyed by living members (*Llewellyn v. Kasintoe Rubber Estates* [1914] 2 Ch. 670).

Care must be exercised, however, in drafting the notice to the liquidator, for if it does not both dissent *and* give the liquidator the option *either* to abstain from carrying out the resolution or to purchase his interest, it may be ignored (*Demerara Rubber Co.* [1913] 1 Ch. 331).

If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved. It may be raised by the liquidator in such manner as may be determined by special resolution (S. 234 (4)).

A special resolution will not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators, but, if an order is made within a year for winding

up the company by or subject to the supervision of the Court, the special resolution must be sanctioned by the Court (S. 234 (4)).

A company which has sufficient powers by virtue of its Memorandum, may sell its undertaking for shares in another company without first going into liquidation, but in such a case the shares which constitute the consideration must be held by the company, and not distributed among the members (*Bisgood v. Henderson's Transvaal Estates Ltd.* [1908] 1 Ch. 743). If a liquidation and a sale and distribution among members is intended, dissentient members must be permitted to exercise those rights available to them under S. 234 or 243. A company may by special resolution, and with the leave of the Court, alter its Memorandum so as to enable it to sell or dispose of its undertaking (S. 5 (1)).

#### § 5.—Arrangements Facilitating Reconstructions or Amalgamations.

In order to facilitate a reconstruction or amalgamation, it is frequently desirable or necessary for the company first to effect a compromise or arrangement with its creditors or/and contributories. In such cases, where an application is made to the Court under S. 153 (see § 1, *supra*) for sanctioning the compromise or arrangement, and that under the reconstruction or amalgamation scheme the whole or any part of the undertaking or property of the *transferor* company is to be transferred to the *transferee* company, the Court may, by S. 154, either—

- (i) by the order sanctioning the compromise, etc.; or
- (ii) by any *subsequent* order;

make provision for all or any of the following matters:—

- (a) the transfer to the *transferee* company of the whole or any part of the undertaking, and of the property or liabilities, of any *transferor* company;
- (b) the allotment or appropriation by the *transferee* company of any shares, debentures, policies, or other like interests in such company which, under the compromise, etc., are to be so dealt with to or for any person;

- (c) the continuation, by or against the *transferee* company, of any legal proceedings pending by or against the *transferor* company;
- (d) the dissolution, *without winding up*, of any *transferor* company;
- (e) the provision to be made for any persons who, within such time and in such manner as the Court direct, *dissent* from the compromise, etc.;
- (f) such incidental, consequential and supplemental matters as are necessary to secure that the *reconstruction or amalgamation* shall be *fully and effectively carried out* (ss. 1).

Where an order under S. 154 (1) provides for the transfer of property or liabilities, such property will, *by virtue of the order*, be transferred to and vest in the transferee company, and such liabilities be transferred to and *become the liabilities* of the transferee company. In the case of any property, this will, *if the order so directs*, be freed from any charge which, by the terms of the compromise, etc., is to cease to attach (ss. 2).

*Every* company affected by the order must file with the Registrar of Companies within 7 days an office copy thereof (ss. 3). The usual "default fine" (not exceeding £5) applies.

The expression "property" includes property, rights and powers of every description, and "liabilities" includes duties (ss. 4). In S. 154, "company" does not include any company other than "a company within the meaning of this Act"—i.e. one formed and registered under the 1929 Act or an "existing" company formed and registered under the 1862 Act or the 1908 Act (*excluding* those registered in Northern Ireland or the Irish Free State).

#### § 6.—Acquisition of Shares of Dissenting Shareholders under S. 155.

Where a scheme or contract involving the transfer of shares from one company to another has, within 4 months of the making of the offer by the **transferee\*** company been

\* Whether a company "within the meaning of the Act" or not.

approved by the holders of not less than **nine-tenths in value** of the shares affected, the transferee company may—  
at any time within **2 months** after the said 4 months have expired, give notice (in the prescribed manner) to any dissentient that it desires to acquire his shares. Then, unless within **1 month** from the date of such notice the dissentient applies to the Court and the Court orders otherwise, the *transferee* company is entitled and must **acquire his shares on the terms of the scheme or contract.**

Where a notice has thus been given by the *transferee* company, and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the *transferee* company must, on the expiration of one month from the date on which the notice has been given, or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the *transferor* company and PAY or transfer to THE TRANSFEROR COMPANY the amount or other consideration representing THE PRICE payable by the *transferee* company FOR THE SHARES which that company is entitled to acquire, and the *transferor* company must thereupon register the *transferee* company as the holder of those shares (ss. 2).

Any sums received by the *transferor* company under this Section must be paid into a SEPARATE BANK ACCOUNT, and any such sums and any other consideration so received must be held by that company on trust for the persons entitled to the shares in respect of which the said sums or other consideration were respectively received (ss. 3).

The expression "dissenting shareholder" here includes (i) a shareholder who has not assented to the scheme or contract, *and also* (ii) *any shareholder who has failed or refused to transfer his shares* to the transferee company in accordance with the scheme or contract (ss. 4).



## APPENDIX I

### FIRST SCHEDULE

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TABLE A

#### REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES

##### *Preliminary*

1. In these regulations:—

“The Act” means the Companies Act, 1929.

When any provision of the Act is referred to, the reference is to that provision as modified by any statute for the time being in force.

Unless the context otherwise requires, expressions defined in the Act or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meanings so defined.

##### *Shares*

2. Subject to the provisions, if any, in that behalf of the memorandum of association, and without prejudice to any special rights previously conferred on the holders of existing shares, any share may be issued with such preferred, deferred, or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine, and any preference share may, with the sanction of a special resolution, be issued on the terms that it is, or at the option of the company is liable, to be redeemed.

3. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class and that any holder of shares of the class present in person or by proxy may demand a poll.

4. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the seal of the company specifying the share or shares held by him and the amount paid up thereon, provided that in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all.

5. If a share certificate is defaced, lost, or destroyed, it may be renewed on payment of such fee, if any, not exceeding one shilling, and on such terms, if any, as to evidence and indemnity, as the directors think fit.

6. No part of the funds of the company shall directly or indirectly be employed in the purchase of, or in loans upon the security of, the company's shares, but nothing in this regulation shall prohibit transactions mentioned in the proviso to section 45 (1) of the Act.

### *Lien*

7. The company shall have a lien on every share (not being a fully paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully paid shares) standing registered in the name of a single person for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this regulation. The company's lien, if any, on a share shall extend to all dividends payable thereon.

8. The company may sell, in such manner as the directors think fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled thereto by reason of his death or bankruptcy.

9. For giving effect to any such sale the directors may authorise some person to transfer the shares sold to the purchaser thereof. The purchaser shall be registered as the holder of the shares comprised in any such transfer and he shall not be bound to see to the application of the purchase money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

10. The proceeds of the sale shall be received by the company and applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale.

### *Calls on Shares*

11. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payment) pay to the company at the time or times so specified the amount called on his shares.

12. The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

13. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five pounds per centum per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

14. The provisions of these regulations as to the liability of joint holders and as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

15. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

16. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by him; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors.

#### *Transfer and Transmission of Shares*

17. The instrument of transfer of any share shall be executed by or on behalf of the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof.

18. Shares shall be transferred in the following form, or in any usual or common form which the directors shall approve:

I, *A.B.*, of \_\_\_\_\_, in consideration of the  
 sum of £ \_\_\_\_\_ paid to me by *C.D.* of \_\_\_\_\_  
 (herein-after called "the said transferee")  
 do hereby transfer to the said transferee the share [*or shares*]  
 numbered \_\_\_\_\_ in the undertaking called the  
 \_\_\_\_\_ Company, Limited, to hold unto the said transferee, subject to  
 the several conditions on which I hold the same: and I, the said  
 transferee, do hereby agree to take the said share [*or shares*]  
 subject to the conditions aforesaid. As witness our hands the  
 day of \_\_\_\_\_

Witness to the signatures of, &c.

19. The directors may decline to register any transfer of shares, not being fully paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognise any instrument of transfer unless—

(a) a fee not exceeding two shillings and sixpence is paid to the company in respect thereof, and



- (b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

If the directors refuse to register a transfer of any shares, they shall within two months after the date on which the transfer was lodged with the company send to the transferee notice of the refusal.

20. The legal personal representatives of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the legal personal representatives of the deceased survivor, shall be the only persons recognised by the company as having any title to the share.

21. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall, upon such evidence being produced as may from time to time be properly required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy.

22. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

#### *Forfeiture of Shares*

23. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

24. The notice shall name a further day (not earlier than the expiration of fourteen days from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that in the event of non-payment at or before the time appointed the shares in respect of which the call was made will be liable to be forfeited.

25. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

26. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

27. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company receive payment in full of the nominal amount of the shares.

28. A statutory declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share. The company may receive the consideration, if any, given for the share on any sale or disposition thereof and may execute a transfer of the share in favour of the person to whom the share is sold or disposed of and he shall thereupon be registered as the holder of the share, and shall not be bound to see to the application of the purchase money, if any, nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

29. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

#### *Conversion of Shares into Stock*

30. The company may by ordinary resolution convert any paid-up shares into stock, and reconvert any stock into paid-up shares of any denomination.

31. The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same regulations, as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

32. The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges, and advantages as regards dividends, voting at meetings of the company, and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

33. Such of the regulations of the company as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stockholder."

#### *Alteration of Capital*

34. The company may from time to time by ordinary resolution increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

35. Subject to any direction to the contrary that may be given by the company in general meeting, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of those shares in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article.

36. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture, and otherwise as the shares in the original share capital.

37. The company may by ordinary resolution—

- (a) Consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;
- (b) Sub-divide its existing shares, or any of them, into shares of smaller amount than is fixed by the memorandum of association subject, nevertheless, to the provisions of section 50 (1) (d) of the Act;
- (c) Cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person.

38. The company may by special resolution reduce its share capital and any capital redemption reserve fund in any manner and with, and subject to, any incident authorised, and consent required, by law.

#### *General Meetings*

39. A general meeting shall be held once in every calendar year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the third month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors.

40. The above-mentioned general meetings shall be called ordinary general meetings; all other general meetings shall be called extraordinary general meetings.

41. The directors may, whenever they think fit, convene an extraordinary general meeting, and extraordinary general meetings shall also be convened on such requisition, or, in default, may be convened by

such requisitionists, as provided by section 114 of the Act. If at any time there are not within the United Kingdom sufficient directors capable of acting to form a quorum, any director or any two members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.

#### *Notice of General Meetings*

42. Subject to the provisions of section 117 (2) of the Act relating to special resolutions, seven days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day, and the hour of meeting and, in case of special business, the general nature of that business shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company; but with the consent of all the members entitled to receive notice of some particular meeting, that meeting may be convened by such shorter notice and in such manner as those members may think fit.

43. The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any member shall not invalidate the proceedings at any meeting.

#### *Proceedings at General Meetings*

44. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, the consideration of the accounts, balance sheets, and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

45. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members personally present shall be a quorum.

46. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the members present shall be a quorum.

47. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

48. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

49. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

50. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least three members present in person or by proxy entitled to vote or by one member or two members so present and entitled, if that member or those two members together hold not less than 15 per cent. of the paid up capital of the company, and, unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.

51. If a poll is duly demanded it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

52. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote.

53. A poll demanded on the election of a chairman or on a question of adjournment, shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

#### *Votes of Members*

54. On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder.

55. In the case of joint holders the vote of the senior who tenders a vote whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

56. A member of unsound mind, or in respect of whom an order has been made by any court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee, curator bonis, or other person in the nature of a committee or curator bonis appointed by that court, and any such committee, curator bonis, or other person may, on a poll, vote by proxy.

57. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

58. On a poll votes may be given either personally or by proxy.

59. The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or, if the appointor is a corporation, either under seal, or under the hand of an officer or attorney duly authorised. A proxy need not be a member of the company.

60. The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of that power or authority shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting or adjourned meeting, at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

61. An instrument appointing a proxy may be in the following form, or any other form which the directors shall approve:—

Company, Limited.

"I, \_\_\_\_\_, of \_\_\_\_\_,  
 in the county of \_\_\_\_\_, being a member  
 of the \_\_\_\_\_ Company, Limited,  
 hereby appoint \_\_\_\_\_, of \_\_\_\_\_,  
 as my proxy, to vote for me and on my behalf  
 at the [ordinary or extraordinary, as the case may be] general meeting  
 of the company to be held on the \_\_\_\_\_ day of \_\_\_\_\_  
 and at any adjournment thereof."

Signed this \_\_\_\_\_ day of \_\_\_\_\_ .

62. The instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll.

#### *Corporations acting by Representatives at Meetings*

63. Any corporation which is a member of the company may by resolution of its directors or other governing body authorise such person as it thinks fit to act as its representative at any meeting of the company or of any class of members of the company, and the person so authorised shall be entitled to exercise the same powers on behalf of the corporation which he represents as that corporation could exercise if it were an individual member of the company.

#### *Directors*

64. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association.

65. The remuneration of the directors shall from time to time be determined by the company in general meeting.

66. The qualification of a director shall be the holding of at least one share in the company.

*Powers and Duties of Directors*

67. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company, as are not, by the Act, or by these articles, required to be exercised by the company in general meeting, subject, nevertheless, to any regulation of these articles, to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

68. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation or retirement of directors; but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

69. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

70. The directors shall cause minutes to be made in books provided for the purpose—

- (a) Of all appointments of officers made by the directors;
- (b) Of the names of the directors present at each meeting of the directors and of any committee of the directors;
- (c) Of all resolutions and proceedings at all meetings of the company, and of the directors, and of committees of directors;

and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

*The Seal*

71. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of a director and of the secretary or such other person as the directors may appoint for the purpose; and that director and the secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

*Disqualification of Directors*

72. The office of director shall be vacated, if the director—

- (a) ceases to be a director by virtue of section 141 of the Act; or

- (b) without the consent of the company in general meeting holds any other office of profit under the company except that of managing director or manager; or
- (c) becomes bankrupt; or
- (d) becomes prohibited from being a director by reason of any order made under sections 217 or 275 of the Act; or
- (e) is found lunatic or becomes of unsound mind; or
- (f) resigns his office by notice in writing to the company; or
- (g) is directly or indirectly interested in any contract with the company or participates in the profits of any contract with the company.

Provided, however, that a director shall not vacate his office by reason of his being a member of any corporation which has entered into contracts with or done any work for the company if he shall have declared the nature of his interest in manner required by section 149 of the Act, but the director shall not vote in respect of any such contract or work or any matter arising thereout, and if he does so vote his vote shall not be counted.

#### *Rotation of Directors*

73. At the first ordinary general meeting of the company the whole of the directors shall retire from office, and at the ordinary general meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest one-third, shall retire from office.

74. The directors to retire in every year shall be those who have been longest in office since their last election but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

75. A retiring director shall be eligible for re-election.

76. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto and in default the retiring director shall be deemed to have been re-elected unless at such meeting it is resolved not to fill up such vacated office.

77. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

78. Any casual vacancy occurring in the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

79. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.



80. The company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead. The person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

*Proceedings of Directors*

81. The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors.

82. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall when the number of directors exceeds three be three, and when the number of directors does not exceed three, be two.

83. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

84. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

85. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on it by the directors.

86. A committee may elect a chairman of its meetings; if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

87. A committee may meet and adjourn as it thinks proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes the chairman shall have a second or casting vote.

88. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

*Dividends and Reserve*

89. The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors.

90. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

91. No dividend shall be paid otherwise than out of profits.

92. Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid up on any of the shares in the company dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share.

93. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalising dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

94. If several persons are registered as joint holders of any share, any one of them may give effectual receipts for any dividend or other moneys payable on or in respect of the share.

95. Any dividend may be paid by cheque or warrant sent through the post to the registered address of the member or person entitled thereto or in the case of joint holders to any one of such joint holders at his registered address or to such person and such address as the member or person entitled or such joint holders as the case may be may direct. Every such cheque or warrant shall be made payable to the order of the person to whom it is sent or to the order of such other person as the member or person entitled or such joint holders as the case may be may direct.

96. No dividend shall bear interest against the company.

*Accounts*

97. The directors shall cause proper books of account to be kept with respect to—

All sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

All sales and purchases of goods by the company; and

The assets and liabilities of the company.

98. The books of account shall be kept at the registered office of the company, or at such other place or places as the directors think fit, and shall always be open to the inspection of the directors.

99. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by statute or authorised by the directors or by the company in general meeting.

100. The directors shall from time to time in accordance with section 123 of the Act, cause to be prepared and to be laid before the company in general meeting such profit and loss accounts, balance sheets and reports as are referred to in that section.

101. A copy of every balance sheet (including every document required by law to be annexed thereto) which is to be laid before the company in general meeting together with a copy of the Auditors' report shall not less than seven days before the date of the meeting be sent to all persons entitled to receive notices of general meetings of the company.

#### *Audit*

102. Auditors shall be appointed and their duties regulated in accordance with sections 132, 133 and 134 of the Act.

#### *Notices*

103. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address, or (if he has no registered address within the United Kingdom) to the address, if any, within the United Kingdom supplied by him to the company for the giving of notices to him.

Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and to have been effected in the case of a notice of a meeting at the expiration of 24 hours after the letter containing the same is posted, and in any other case at the time at which the letter would be delivered in the ordinary course of post.

104. If a member has no registered address within the United Kingdom and has not supplied to the company an address within the United Kingdom for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating the neighbourhood of the registered office of the company, shall be deemed to be duly given to him at noon on the day on which the advertisement appears.

105. A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder named first in the register of members in respect of the share.

106. A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or trustee of the bankrupt, or by any like description, at the address, if any, within the United Kingdom supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred.

107. Notice of every general meeting shall be given in some manner hereinbefore authorised to (a) every member except those members who (having no registered address within the United Kingdom) have not supplied to the company an address within the United Kingdom for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or bankruptcy of a member, who, but for his death or bankruptcy, would be entitled to receive notice of the meeting. No other persons shall be entitled to receive notices of general meetings.

## APPENDIX II

### FIRST SCHEDULE

TABLE B

#### FORM OF MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES

1st. The name of the company is "The Eastern Steam Packet Company, Limited."

2nd. The registered office of the company will be situate in England.

3rd. The objects for which the company is established are, "the conveyance of passengers and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th. The liability of the members is limited.

5th. The share capital of the company is two hundred thousand pounds divided into one thousand shares of two hundred pounds each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.			Number of shares taken by each Subscriber.
1. John Jones of	in the county of	merchant	200
2. John Smith of	in the county of	"	25
3. Thomas Green of	in the county of	"	30
4. John Thompson of	in the county of	"	40
5. Caleb White of	in the county of	"	15
6. Andrew Brown of	in the county of	"	5
7. Caesar White of	in the county of	"	10
Total shares taken			<u>325</u>

Dated the                      day of                      19   .

Witness to the above signatures,

A.B., No. 13, Hute Street, Clerkenwell, London.

# APPENDIX III

## THIRD SCHEDULE

### FORM OF STATEMENT IN LIEU OF PROSPECTUS TO BE DELIVERED TO REGISTRAR BY A PRIVATE COMPANY ON BECOMING A PUBLIC COMPANY

THE COMPANIES ACT, 1929

Statement in lieu of Prospectus delivered for registration by  
[Insert the name of the Company.]

Pursuant to section 27 of the Companies Act, 1929.

Delivered for registration by

The nominal share capital of the Company.	£		
Divided into - - - - -	Shares of £	each.	
	" "	"	
Amount (if any) of above capital which consists of redeemable preference shares.	Shares of £	each.	
The date on or before which these shares are, or are liable, to be redeemed.			
Names, descriptions and addresses of directors or proposed directors.			
Amount of shares issued - - -	Shares		
Amount of commissions paid in connection therewith.			
Amount of discount, if any, allowed on the issue of any shares, or so much thereof as has not been written off at the date of the statement.			
Unless more than one year has elapsed since the date on which the Company was entitled to commence business:—			
Amount of preliminary expenses.	£		
Amount paid to any promoter -	Name of promoter.		
	Amount £		
Consideration for the payment -	Consideration:—		
If the share capital of the Company is divided into different classes of shares, the right of voting at meetings of the Company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.			
Number and amount of shares and debentures issued within the two years preceding the date of this statement as fully or partly paid up otherwise than for cash or agreed to be so issued at the date of this statement.	1. shares of £ fully paid.		
	2. shares upon which £ per share credited as paid.		

Consideration for the issue of those shares or debentures.

Names and addresses of Vendors of Property (1) purchased or acquired by the Company within the two years preceding the date of this statement or (2) agreed or proposed to be purchased or acquired by the Company.

Amount (in cash, shares or debentures) paid or payable to each separate vendor.

Amount paid or payable in cash, shares or debentures for any such property, specifying the amount paid or payable for goodwill.

Dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of business or entered into more than two years before the delivery of this statement).

Time and place at which the contracts or copies thereof may be inspected.

Names and addresses of the auditors of the Company.

Full particulars of the nature and extent of the interest of every director in any property purchased or acquired by the Company within the two years preceding the date of this statement or proposed to be purchased or acquired by the Company or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become or to qualify him as, a director, or otherwise for services rendered or to be rendered to the Company by him or by the firm.

Rates of the dividends (if any) paid by the Company in respect of each class of shares in the Company in each of the three financial years immediately preceding the date of this statement or since the incorporation of the Company whichever period is the shorter.

3. debenture £

4. Consideration:—

Total purchase price £

Cash - - £

Shares - - £

Debentures - - £

Goodwill - - £

Particulars of the cases in which no dividends have been paid in respect of any class of shares in any of these years. If any of the unissued shares or debentures are to be applied in the purchase of any business the amount, as certified by the persons by whom the accounts of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement, provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year the above requirement shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on.

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(Signatures of the persons above-named  
as directors or proposed directors or of  
their agents authorised in writing.)

*Date* .

NOTE.—In this Form the expression “vendor” includes a vendor as defined in Part III of the Fourth Schedule to this Act, and the expression “financial year” has the meaning assigned to it in that Part of the said Schedule.



## FIFTH SCHEDULE

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Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.	Total purchase price £ Cash - - £ Shares - - £ Debentures - £ <hr/> Goodwill - £ <hr/>
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the Company; or	Amount paid. " payable.
Rate of the commission - - -	Rate per cent.
The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.	
Estimated amount of preliminary expenses.	£ .
Amount paid or intended to be paid to any promoter.	Name of promoter.
Consideration for the payment - -	Amount £ . Consideration:—
Dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the Company or entered into more than two years before the delivery of this statement).	
Time and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the Company (if any).	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the Company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the Company.	

If it is proposed to acquire any business, the amount, as certified by the persons by whom the accounts of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year the above requirement shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on.

---

(Signatures of the persons above-named as directors or proposed directors, or of their agents authorised in writing.)

.....

*Date* .

.....

.....

NOTE.—In this Schedule the expression “vendor” includes a vendor as defined in Part III of the Fourth Schedule to this Act, and the expression “financial year” has the meaning assigned to it in that Part of the said Schedule.

# APPENDIX V SIXTH SCHEDULE

## FORM OF ANNUAL RETURN OF A COMPANY HAVING A SHARE CAPITAL

Annual Return of the                      Company Limited made up to  
the                      day of                      19                      (being the  
fourteenth day after the date of the first or only ordinary general  
meeting in 19..).

The address of the registered office of the Company is as follows:—

.....

.....

### *Summary of Share Capital and Shares.*

Nominal Share Capital £	divided into*	}	£	shares of each.
		}	£	shares of each.

Total number of shares taken up\* to the                      day of  
19                      , being the date of the  
return (which number must agree with the total  
shown in the list as held by existing members).

Number of shares issued subject to payment wholly  
in cash.

Number of shares issued as fully paid up otherwise than  
in cash.

Number of shares issued as partly paid up to the extent  
of                      per share otherwise than in cash.

†Number of                      shares (if any) issued at a  
discount.

Total amount of discount on the issue of shares which                      £  
has not been written off at the date of this Return.

‡There has been called up on each of                      shares.                      £

‡There has been called up on each of                      shares.                      £

‡There has been called up on each of                      shares.                      £

\* Where there are shares of different kinds or amounts (e.g., Preference  
and Ordinary or £1 and 1s.) state the number and nominal values separately.

† If the shares are of different kinds, state them separately.

‡ Where various amounts have been called, or there are shares of different  
kinds, state them separately.

*Total amount of calls received, including payments on application and allotment.	£
Total amount (if any) agreed to be considered as paid on shares which have been issued as fully paid up otherwise than in cash.	£
Total amount (if any) agreed to be considered as paid on shares which have been issued as partly paid up to the extent of per share otherwise than in cash.	£
Total amount of calls unpaid - - - - -	£
Total amount of the sums (if any) paid by way of commission in respect of any shares or debentures or allowed by way of discount in respect of any debentures since the date of the last Return.	£
Total number of shares forfeited - - - - -	
Total amount paid (if any) on shares forfeited.	£
Total amount of shares for which share warrants to bearer are outstanding.	£
Total amount of share warrants to bearer issued and surrendered respectively since the date of the last Return.	Issued £ Surrendered £
Number of shares comprised in each share warrant to bearer.	
Total amount of the indebtedness of the Company in respect of all mortgages and charges of the kind which are required (or, in the case of a Company registered in Scotland, which, if the Company had been registered in England, would be required) to be registered with the Registrar of Companies under the Companies Act, 1929.	£

*Copy of last audited Balance Sheet of the Company*

NOTE.—Except where the Company is (1) a “Private Company” within the meaning of Section 26 of the Companies Act, 1929, or is (2) an Assurance Company which has complied with the provisions of Section 7 (4) of the Assurance Companies Act, 1909, this Return must include a written copy, certified by a Director or by the Manager or Secretary of the Company to be a true copy, of the last balance sheet which has been audited by the Company’s auditors (including every document required by law to be annexed thereto) together with a copy of the report of the auditors thereon (certified as aforesaid), and if any such balance sheet is in a foreign language there must also be annexed to it a translation thereof in English certified in the prescribed manner to be a correct translation. If the said last balance sheet

\* Include what has been received on forfeited as well as on existing shares.

did not comply with the requirements of the law as in force at the date of the audit with respect to the form of balance sheets there must be made such additions to and corrections in the said copy as would have been required to be made in the said balance sheet in order to make it comply with the said requirements, and the fact that the said copy has been so amended must be stated thereon.

*Private Company.*

Certificates to be given by a Private Company.

A. "I certify that the Company has not since the date of the last\* Annual Return issued any invitation to the public to subscribe for any shares or debentures of the Company."

(Signature)

(State whether Director or Secretary.)

B. Should the number of members of the Company exceed fifty the following certificate is also required:—

"I certify that the excess of members of the Company above fifty consists wholly of persons who are in the employment of the Company and/or of persons who, having been formerly in the employment of the Company were while in such employment, and have continued after the determination of such employment to be, members of the Company."

(Signature)

(State whether Director or Secretary.)

NOTE.—Banking companies must add a list of all their places of business.

The Return must be signed at the end by a Director or by the Manager or Secretary of the Company.

Delivered for filing by

\* In the case of the first Annual Return strike out the words "last Annual Return" and substitute therefor the words "Incorporation of the Company"

Particulars of the Directors\* of the  
Company, Limited, at the date of the Annual Return.

†The present Christian Name or Names and Surname.	Any former Christian Name or Names or Surname.	National- ity.	Nationality of origin (if other than the present national- ity).	Usual residential address.	‡Other business occupation if any. If none state so.

\* "Director" includes any person who occupies the position of a Director by whatever name called and any person in accordance with whose directions or instructions the Directors of a Company are accustomed to act.

† In the case of a Corporation its corporate name and registered or principal office should be shown.

‡ In the case of an individual who has no business occupation but holds any other directorship or directorships particulars of that directorship or of some one of those directorships must be entered.





APPENDIX VI

SEVENTH SCHEDULE

---

FORM OF STATEMENT TO BE PUBLISHED BY BANKING AND  
INSURANCE COMPANIES AND DEPOSIT, PROVIDENT, OR  
BENEFIT SOCIETIES

\* The share capital of the company is \_\_\_\_\_, divided into  
shares of \_\_\_\_\_ each.

The number of shares issued is \_\_\_\_\_.

Calls to the amount of \_\_\_\_\_ pounds per share have been made,  
under which the sum of \_\_\_\_\_ pounds has been received.

The liabilities of the company on the first day of January (*or* July)  
were—

Debts owing to sundry persons by the company.

On judgment, £  
On specialty, £  
On notes or bills, £  
On simple contracts, £  
On estimated liabilities, £

The assets of the company on that day were—

Government securities [*stating them*]  
Bills of exchange and promissory notes, £  
Cash at the bankers, £  
Other securities, £

\* If the company has no share capital the portion of the statement  
relating to capital and shares must be omitted.

## **APPENDIX VII**

# APPENDIX VII FORMS IN WINDING UP

Form No. 22. (Rule 50.)

STATEMENT OF AFFAIRS.

(Title.)

STATEMENT OF AFFAIRS on the                      day of                      , 19                      , the date of the Winding-up Order (or such other date as the Official Receiver has for special reasons directed).

I.—As regards Creditors.

Gross Liabilities.		Liabilities.		Expected to rank.		Assets.		Estimated to produce.	
£	s. d.		£ s. d.	£	s. d.		£ s. d.	£	s. d.
		Debts and liabilities, viz :—				(a) Property as per List "H," viz.:—			
		(a) Unsecured Creditors as per List "A" (State number)				(a) Cash at bankers .. .. .	..	..	..
						(b) Cash in hand .. .. .	..	..	..
						(c) Stock in trade .. .. .	..	..	..
						(Estimated cost, £ )			
						(d) Machinery .. .. .	..	..	..
						(e) Trade fixtures, fittings, utensils, etc. ..	..	..	..
		(b) . . . . . Creditors fully secured (not including debenture holders), as per List "B" .. .. .				(f) Investments in shares, etc. .. .. .	..	..	..
		Estimated value of securities .. .. .				(g) Loans on mortgage .. .. .	..	..	..
						(h) Other property, viz.:—			
		Estimated surplus £				(b) Book debts ( debtors), as per List "I," viz.:—			
		Carried to List "C" .. .. .				Good .. .. .	..	..	..
		Balance to contra (d) .. .. .					£ s. d.		
		(c) . . . . . Creditors partly secured, as per List "C" .. .. .				Doubtful .. .. .	..	..	..
		Less estimated value of securities .. .. .				Bad .. .. .	..	..	..
		Estimated to rank for dividend .. .. .				Estimated to produce .. .. .	..	..	..

	£	s.	d.		£	s.	d.
(d) Liabilities on bills discounted other than company's own acceptances for value as per List "D", Of which it is expected will rank for dividend .. ..				(c) Bills of exchange, or other similar securities on hand, as per List "J" Estimated to produce ..			
(e) Other liabilities, as per list "E" .. Of which it is expected will rank for dividend .. ..				(d) Surplus from securities in the hands of creditors fully secured (per contra) (b) .. ..			
(f) .. . . . Preferential creditors for rates, taxes, wages, etc., as per List "F" deducted contra £	£	s.	d.	(e) Unpaid calls ( debtors), as per List "K" .. ..		£	s. d.
(g) Loans on debenture bonds, as per List "G" deducted contra (£ holders)				Estimated to produce ..			
Estimated surplus (if any) after meeting liabilities of company, subject to cost of liquidation ..				Estimated total assets ..			
				Deduct preferential creditors as per contra (f) .. ..			
				Estimated amount available to meet claims of debenture holders .. ..			
				Deduct loans on debenture bonds secured on the assets of the company as per contra (g) .. ..			
				Estimated amount available to meet unsecured creditors, subject to cost of liquidation ..			
				Estimated deficiency of assets to meet liabilities of the company, subject to cost of liquidation ..			
							£

The nominal amount of unpaid capital liable to be called up is £ .. .. which is [available to meet above deficiency] or [charged to debenture holders], or as the case may be.

The nominal amount of unpaid capital liable to be called up is £                     which is [available to meet above deficiency] or [charged to debenture holders], or as the case may be.



I, \_\_\_\_\_ of \_\_\_\_\_ make oath and say

are, to the

that the foregoing Statement and the Several Lists hereunto annexed marked

best of my knowledge and belief, a full, true, and complete statement of the affairs of the above-named Company, on the

day of \_\_\_\_\_ 19\_\_\_\_, the date of the winding-up order. (a)

NOTE.—*The Commissioner is particularly requested, before swearing the Affidavit, to ascertain that the full name, address, and Description of the Deponent are stated, and to initial all crossings-out or other alterations on the printed form. A deficiency in the Affidavit in any of the above respects will entail its refusal by the Court, and will necessitate its being re-sworn.*

Sworn at \_\_\_\_\_ in the County of \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ Before me \_\_\_\_\_ Signature.

A Commissioner, etc.

(a) Where the Official Receiver has directed any date other than the date of the winding-up order substitute such other date.

## LIST "A."

## UNSECURED CREDITORS.

The names to be arranged in alphabetical order and numbered consecutively, Creditors for £10 and upwards being placed first.

NOTES.—1. When there is a contra account against the creditor, less than the amount of his claim against the Company, the amount of the creditor's claim and the amount of the contra account should be shown in the third column, and the balance only be inserted under the heading "Amount of Debt," thus:—

Total amount of claim	..	..	..	..
Less: Contra account	..	..	..	..

No such set-off should be included in List "1."

2. The particulars of any bills of exchange and promissory notes held by a creditor should be inserted immediately below the name and address of such creditor.

3. The names of any creditors who are also contributories, or alleged to be contributories, of the Company must be shown separately, and described as such at the end of the List.

No.	Name.	Address and Occupation.	Amount of Debt.			Date when contracted.		Consideration.
			£	s.	d.	Month.	Year.	

Signature

Dated

19

## LIST "B."

CREDITORS FULLY SECURED (NOT INCLUDING DEBENTURE HOLDERS).

No.	Name of Creditor.	Address and Occupation.	Amount of Debt.	Date when Contracted.		Consideration.	Particulars of Security.	Date when given.	Estimated value of Security.		Estimated Surplus from Security.	
				Month	Year.				£	s. d.	£	s. d.
			£						£	s. d.	£	s. d.

Signature

Dated

19

## LIST "C."

CREDITORS PARTLY SECURED.

(State whether also Contributories of the Company.)

No.	Name of Creditor.	Address and Occupation.	Amount of Debt.	Date when Contracted.		Consideration.	Particulars of Security.	Month and Year when given.	Estimated value of Security.		Balance of Debt Unsecured.	
				Month	Year.				£	s. d.	£	s. d.
			£						£	s. d.	£	s. d.

Signature

Dated

19



## LIST "D."

LIABILITIES OF COMPANY ON BILLS DISCOUNTED OTHER THAN THEIR OWN ACCEPTANCES FOR VALUE.

No.	Acceptor's Name, Address, and Occupation.	Whether liable as Drawer or Indorser.	Date when due.	Amount.		Holder's Name, Address and Occupation (if known).	Amount expected to rank for Dividend.		
				£	d.		£	s.	d.

Signed

Dated

19

## LIST "E." OTHER LIABILITIES.

FULL PARTICULARS OF ALL LIABILITIES NOT OTHERWISE SCHEDULED TO BE GIVEN HERE.

No.	Name of Creditor or Claimant.	Address and Occupation.	Amount of Liability or Claim.	Date when Liability incurred.		Nature of Liability.	Consideration.	Amount expected to rank against Assets for dividend.		
				Month.	Year.			£	s.	d.
			£							

Signature

Dated

19

LIST "F."  
PREFERENTIAL CREDITORS FOR RATES, TAXES, SALARIES, WAGES AND OTHERWISE.

No.	Name of Creditor.	Address and Occupation.	Nature of Claim.	Period during which Claim accrued due.	Date when due.	Amount of Claim.		Amount payable in full.		Difference ranking for Dividend.	
						£	s. d.	£	s. d.	£	s. d.

Signature Dated 19 .

LIST "G."

LIST OF DEBENTURE HOLDERS.

The names to be arranged in alphabetical order and numbered consecutively. *Separate Lists* must be furnished of holders of each issue of Debentures, should more than one issue have been made.

No.	Name of Holder.	Address.	Amount.		Description of Assets over which security extends.	
			£	s. d.		

Signature Dated 19 .

## LIST "H."

## PROPERTY.

Full particulars of every description of property not included in any other lists are to be set forth in this list.

Full Statement and Nature of Property.	Estimated Cost.			Estimated to produce.		
	£	s.	d.	£	s.	d.
(a) Cash at Bankers .. ..						
(b) Cash in hand .. ..						
(c) Stock in Trade, at .. ..						
(d) Machinery, at .. ..						
(e) Trade fixtures, fittings, office furniture, utensils, etc. ..						
(f) Investments in Stocks or Shares, &c.						
rs.] (g) Loans for which Mortgage or other security held .. ..						
(h) Other property, viz. :—						

Signature

## LIST "I"

## DEBTS DUE TO THE COMPANY.

The names to be arranged in alphabetical order, and numbered consecutively.  
 Note.—If any debtor to the Company is also a creditor, but for a less amount than his indebtedness, the gross amount due to the Company and the amount of the Contra account should be shown on the 3rd column, and the balance only be inserted under the heading "Amount of Debt," thus:—

Due to Company .. ..  
 Less: Contra account .. ..

No such claim should be included in sheet "A."

No.	Name.	Residence and Occupation.	Amount of Debt.						Folio of Ledger or other book where Particulars to be found	When Con-tracted.		Estimated to Produce.	Particulars of any Securities held for Debt.
			Good.		Doubtful.		Bad.			Month.	Year.		
			£	s.	d.	£	s.	d.				£	s.

Signature

Dated

19

LIST "J."  
BILLS OF EXCHANGE, PROMISSORY NOTES, ETC., ON HAND AVAILABLE AS ASSETS.

No.	Name of Acceptor of Bill or Note.	Address, etc.	Amount of Bill or Note.		Date when due.	Estimated to produce.		Particulars of any Property held as security for Payment of Bill or Note.
			£	s. d.		£	s. d.	
			£	s. d.		£	s. d.	

Signature Dated 19 .

LIST "K." UNPAID CALLS.

Consecutive No.	No. in Share Register.	Name of Shareholder.	Address and Occupation.	No. of Shares held.	Amount of Call per Share unpaid.		Total amount due.		Estimated to realise.	
					£	s. d.	£	s. d.	£	s. d.
					£	s. d.	£	s. d.	£	s. d.

Signature Dated 19 .

LIST "L."  
LIST OF FOUNDERS' SHARES.

Consecutive No.	Register No.	Name of Shareholder.	Address.	Nominal amount of Share.	No. of Shares held.	Amount per Share called up.		Total amount called up.	
						£	s. d.	£	s. d.
						£	s.	d.	

Signature \_\_\_\_\_ Dated \_\_\_\_\_ 19\_\_\_\_

NOTE.—List "M" (List of Ordinary Shares) and List "N" (List of Preference Shares) are identical with the above form.



	£	s.	d.	
IV. Dividends declared during same period .. .. .				
V. Losses and depreciation written off in Company's books (2):—				
Bad Debts .. .. .				
Losses on Investments .. .. .				
Depreciation on Property .. .. .				
Preliminary Expenses .. .. .				
VI. Losses and depreciation not written off in Company's books, now written off by the Directors (2):—				
Bad Debts .. .. .				
Losses on Investments .. .. .				
Depreciation on Property .. .. .				
Preliminary Expenses .. .. .				
VII. Other Losses and Expenses .. .. .				
Total amount accounted for .. .. .				(3) £

NOTES.—(1) Where the Official Receiver has so directed substitute any other date.

(2) Where particulars are numerous they should be inserted in a separate Schedule.

(3) These figures should agree.

**Signature**

**Dated**

19





III. Directors' Fees from the (2) day of 19 , to date of Winding-up Order (1) .. .. .						
IV. Dividends declared during same period .. .. .						
V. Losses and depreciation from the day of 19, (2), written off in Company's books, viz. (3):—						
Bad Debts .. .. .	..	..	..	..	..	..
Losses on Investments .. .. .	..	..	..	..	..	..
Depreciation of Property .. .. .	..	..	..	..	..	..
Preliminary Expenses .. .. .	..	..	..	..	..	..
VI. Losses and depreciation not written off in Com- pany's books, now written off by Directors (3):—						
Bad Debts .. .. .	..	..	..	..	..	..
Losses on Investments .. .. .	..	..	..	..	..	..
Depreciation of Property .. .. .	..	..	..	..	..	..
Preliminary Expenses .. .. .	..	..	..	..	..	..
VII. Other Losses and Expenses (3) .. .. .	..	..	..	..	..	..
Total amount accounted for .. .. .	..	..	..	..	..	.. (4) £

NOTES.—(1) Where the Official Receiver has so directed substitute any other date.

- (1) Where the Official Receiver has so directed substitute any other date.
- (2) Three years before date of Winding-up Order or such other date as the Official Receiver has directed.

- (3) Where particulars are numerous they should be inserted in a separate Schedule.
- (4) These figures should agree.

**Signature**

**Dated**

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LIST "P."  
IN SUBSTITUTION FOR SUCH OF THE LISTS NAMED "A" TO "O" AS WILL HAVE TO BE RETURNED BLANK.

LIST.	PARTICULARS, AS PER FRONT SHEET.	REMARKS. <i>Where no particulars are entered on any one or more of the Lists named "A" to "O" the word "Nil" should be inserted in this column opposite the particular List or Lists left blank.</i>
A	Unsecured Creditors .. .. .	
B	Creditors fully secured (not including debenture holders) ..	
C	Creditors partly secured .. .. .	
D	Liabilities on Bills discounted other than the Company's own acceptance for value.	
E	Other liabilities .. .. .	
F	Preferential Creditors for rates, taxes, wages, etc. ..	
G	Loans on Debenture Bonds .. .. .	
H	Property .. .. .	
I	Book Debts .. .. .	
J	Bills of Exchange or other similar securities on hand ..	
K	Unpaid Calls .. .. .	
L	Founders' Shares .. .. .	
M	Ordinary Shares .. .. .	
N	Preference Shares .. .. .	
O	Deficiency Account .. .. .	

Signature  
Dated

## Form No. 92. (Rules 194, 195, and 198.)

[Re

(No registration  
fee payable.)This is the Exhibit marked B  
referred to in the affidavit  
of \_\_\_\_\_ ; sworn before me  
this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_.No. of  
Company }

A Commissioner for Oaths.]

STATEMENT OF RECEIPTS AND PAYMENTS AND GENERAL DIRECTIONS  
AS TO STATEMENTS.

(Name of Company.)

(1) Every statement must be on sheets 13 inches by 16 inches. Size of sheets

(2) Every statement must contain a detailed account of all the liquidator's realisations and disbursements in respect of the company. The statement of realisations should contain a record of all receipts derived from assets existing at the date of the winding-up resolution and subsequently realised, including balance in bank, book debts and calls collected, property sold, etc., and the account of disbursements should contain all payments for costs and charges, or to creditors, or contributories. Where property has been realised, the gross proceeds of sale must be entered under realisations, and the necessary payments incidental to sales must be entered as disbursements. These accounts should not contain payments into the companies liquidation account (except unclaimed dividends—see par. 5) or payments into or out of bank, or temporary investments by the liquidator, or the proceeds of such investments when realised, which should be shown separately:—

Form and  
contents of  
Statement.

(a) by means of the bank pass book;

(b) by a separate detailed statement of moneys invested by the liquidator, and investments realized.

Interest allowed or charged by the bank, bank commission, &c., and profit or loss upon the realisation of temporary investments, should, however, be inserted in the accounts of realizations or disbursements, as the case may be. Each receipt and payment must be entered in the account in such a manner as sufficiently to explain its nature. The receipts and payments must severally be added up at the foot of each sheet, *and the totals carried forward from one account to another without any intermediate balance, so that the gross totals shall represent the total amounts received and paid by the liquidator respectively.*

(3) When the liquidator carries on a business, a trading account must be forwarded as a distinct account, and the totals of receipts and payments on the trading account must alone be set out in the statement. Trading  
Account.

(4) When dividends or instalments of compositions are paid to creditors, or a return of surplus assets is made to contributories, the total amount of each dividend, or instalment of composition, or return to contributories, actually paid, must be entered in the statement of disbursements as one sum; and the liquidator must forward separate Dividends,  
etc.

accounts showing in lists the amount of the claim of each creditor, and the amount of dividend or composition payable to each creditor, and of surplus assets payable to each contributory, distinguishing in each list the dividends or instalments of composition and shares of surplus assets actually paid and those remaining unclaimed. Each list must be on sheets 13 inches by 8 inches.

(5) When unclaimed dividends, instalments of composition or returns of surplus assets are paid into the companies liquidation account, the total amount so paid in should be entered in the statement of disbursements as one sum.

(6) Credit should not be taken in the statement of disbursements for any amount in respect of liquidator's remuneration unless it has been duly allowed by resolution of the Committee of Inspection or of the creditors or of the company in general meeting, or by order of court as the case may require.

#### LIQUIDATOR'S STATEMENT OF ACCOUNT.

*Pursuant to Section 284 of the Companies Act, 1929.*

Name of Company

Nature of proceedings (*whether a members'*  
*or creditors' voluntary winding up or*  
*a winding up under the supervision of*  
*the Court*).

Date of commencement of winding-up

Date to which statement is brought down

Name and address of liquidator

This statement is required in duplicate.

FORM 92—continued.  
LIQUIDATOR'S STATEMENT OF ACCOUNT PURSUANT TO S. 284 OF THE COMPANIES ACT, 1929.

REALIZATIONS.				DISBURSEMENTS.			
Date.	Of whom received.	Nature of Assets Realized.	Amount.	Date.	To whom paid.	Nature of Disbursements.	Amount.
		Brought forward ..	£ s. d.			Brought forward ..	£ s. d.
		Carried forward ..				Carried forward ..	

NOTE.—No balance should be shown on this Account, but only the total Realizations and Disbursements, which should be carried forward to the next Account.

## ANALYSIS OF BALANCE.

					£	s	d.
Total Realizations	..	..	..	..	..	"	"
" Disbursements	..	..	..	..	..	"	"
				Balance	..	"	"

The Balance is made up as follows:—

1. Cash in hands of liquidator	..	..	..	"	"
	£	s.	d.		
2. Total payments into Bank, including balance at date of commencement of winding up ( <i>as per Bank Book</i> )	..	..	..	"	"
Total withdrawals from Bank	..	..	..	"	"
Balance at Bank				"	"
3. Amount in Companies Liquidation Account	..			"	"
	£	s.	d.		
*4. Amounts invested by liquidator		"	"		
Less Amounts realised from same	..	..	"	"	
Balance	..	..		"	"
Total Balance as shown above	..	..	£	"	"

[NOTE.—Full details of Stocks purchased for investment and realization thereof should be given in a separate statement.]

\* The investment or deposit of money by the liquidator does not withdraw it from the operation of section 285 of the Companies Act, 1929, and any such investments representing money held for six months or upwards must be realised and paid into the Companies Liquidation Account, except in the case of investments in Government securities, the transfer of which to the control of the Board of Trade will be accepted as a sufficient compliance with the terms of the section.

NOTE.—The liquidator should also state—

- |   |   |  |  |
|---|---|--|--|
| (1) The amount of the estimated assets and liabilities at the date of the commencement of the winding-up. | { Assets (after deducting amounts charged to secured creditors and debenture holders) .. £<br>{ Liabilities { Secured creditors £<br>{ Debenture holders £<br>{ Unsecured creditors £ |  |  |
| (2) The total amount of the capital paid up at the date of the commencement of the winding-up.            |   | { Paid up in cash £<br>{ Issued as paid up otherwise than for cash .. .. £ |  |
|   |   |  |  |
|   |   |  |  |

- (3) The general description and  
estimated value of out-  
standing assets (if any). }
- 

- (4) The causes which delay the  
termination of the wind-  
ing-up. }
- 

- (5) The period within which the  
winding-up may probably  
be completed. }
-



## Form No 100 (Rule 202)

## STATEMENT TO ACCOMPANY NOTICE OF APPLICATION FOR RELEASE.

(Title)

Statement showing position of Company at date of application for release.

Dr				Cr.					
Estimated to produce as per company's statement of affairs				Receipts			Payments		
				£	s	d			
£				s	d				
To total receipts from date of winding up order viz (State particulars under the several headings specified in the Statement of Affairs)							By Board of Trade and Court Fees (including Stationery Printing and Postages in respect of Contributories Creditors, and Debtors and fee for audit)		
Receipts per trading account							Law costs of petition		
Other receipts							Law costs of Solicitor to Liquidator		
							Other law costs		
Total							Liquidator's remuneration, viz —		
							per cent on £ assets realised		
							per cent on £ assets distributed in dividend		
Less —							Shorthand writer's charges		
Payments to redeem securities							Special manager's charges		
Costs of execution							Person appointed to assist in preparation of Statements of Affairs		
Payments per trading account							Auctioneer's charges as taxed		
							Other taxed costs		
Net realizations							Costs of possession and maintenance of estate		
							Costs of notices in Gazette and local papers		
Amounts received from calls on contributories made in the winding up							Incidental outlay —		
							Total costs and charges		
							Creditors viz —		
							(a) Preferential		
							(a) Unsecured dividend of £ s d in the £ on £		
							The estimate of amount expected to rank for dividend was £		
							Amount returned to contributories		
							Balance		

Assets not yet realized, including calls, estimated to produce £

(Add here any special remarks the liquidator thinks desirable)

Creditors can obtain any further information by inquiry at the office of the liquidator

Dated this            day of            , 19    .

(Signature of Liquidator)

(Address)

# INDEX

*Matters relating to winding-up are dealt with under the headings "Winding-up by the Court," "Winding-up voluntarily" and "Winding-up generally"*

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